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Institute of Judicial Administration

American Bar Association

**Juvenile Justice Standards**



*STANDARDS RELATING TO*  
*Counsel for Private Parties*

Recommended by the  
IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS

Hon. Irving R. Kaufman, *Chairman*

Approved by the  
HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, 1979

Charles Z. Smith, *Chairman of Drafting Committee II*  
Lee Teitelbaum, *Reporter*

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## DRAFTING COMMITTEE II-COURT ROLES AND PROCEDURES

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Louis P. Bergna  
James N. Bradford  
Elizabeth W. Browne  
Nanette Dembitz  
John E. Echohawk  
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Norman Lefstein  
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James H. Lincoln  
Sam P. McKenzie  
Samuel Z. Montoya  
Mario G. Obledo  
Frank A. Orlando  
Bertram Polow  
George H. Revelle  
Cruz Reynoso  
M.D. Taracido

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## *Preface*

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The standards and commentary in this volume are part of a series designed to cover the spectrum of problems pertaining to the laws affecting children. They examine the juvenile justice system and its relationship to the rights and responsibilities of juveniles. The series was prepared under the supervision of a Joint Commission on Juvenile Justice Standards appointed by the Institute of Judicial Administration and the American Bar Association. Seventeen volumes in the series were approved by the House of Delegates of the American Bar Association on February 12, 1979.

The standards are intended to serve as guidelines for action by legislators, judges, administrators, public and private agencies, local civic groups, and others responsible for or concerned with the treatment of youths at local, state, and federal levels. The twenty-three volumes issued by the joint commission cover the entire field of juvenile justice administration, including the jurisdiction and organization of trial and appellate courts hearing matters concerning juveniles; the transfer of jurisdiction to adult criminal courts; and the functions performed by law enforcement officers and court intake, probation, and corrections personnel. Standards for attorneys representing the state, for juveniles and their families, and for the procedures to be followed at the preadjudication, adjudication, disposition, and postdisposition stages are included. One volume in this series sets forth standards for the statutory classification of delinquent acts and the rules governing the sanctions to be imposed. Other volumes deal with problems affecting nondelinquent youth, including recommendations concerning the permissible range of intervention by the state in cases of abuse or neglect, status offenses (such as truancy and running away), and contractual, medical, educational, and employment rights of minors.

The history of the Juvenile Justice Standards Project illustrates the breadth and scope of its task. In 1971, the Institute of Judicial Administration, a private, nonprofit research and educational organi-

zation located at New York University School of Law, began planning the Juvenile Justice Standards Project. At that time, the Project on Standards for Criminal Justice of the ABA, initiated by IJA seven years earlier, was completing the last of twelve volumes of recommendations for the adult criminal justice system. However, those standards were not designed to address the issues confronted by the separate courts handling juvenile matters. The Juvenile Justice Standards Project was created to consider those issues.

A planning committee chaired by then Judge and now Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit met in October 1971. That winter, reporters who would be responsible for drafting the volumes met with six planning subcommittees to identify and analyze the important issues in the juvenile justice field. Based on material developed by them, the planning committee charted the areas to be covered.

In February 1973, the ABA became a co-sponsor of the project. IJA continued to serve as the secretariat of the project. The IJA-ABA Joint Commission on Juvenile Justice Standards was then created to serve as the project's governing body. The joint commission, chaired by Chief Judge Kaufman, consists of twenty-nine members, approximately half of whom are lawyers and judges, the balance representing nonlegal disciplines such as psychology and sociology. The chairpersons of the four drafting committees also serve on the joint commission. The perspective of minority groups was introduced by a Minority Group Advisory Committee established in 1973, members of which subsequently joined the commission and the drafting committees. David Gilman has been the director of the project since July 1976.

The task of writing standards and accompanying commentary was undertaken by more than thirty scholars, each of whom was assigned a topic within the jurisdiction of one of the four advisory drafting committees: Committee I, Intervention in the Lives of Children; Committee II, Court Roles and Procedures; Committee III, Treatment and Correction; and Committee IV, Administration. The committees were composed of more than 100 members chosen for their background and experience not only in legal issues affecting youth, but also in related fields such as psychiatry, psychology, sociology, social work, education, corrections, and police work. The standards and commentary produced by the reporters and drafting committees were presented to the IJA-ABA Joint Commission on Juvenile Justice Standards for consideration. The deliberations of the joint commission led to revisions in the standards and commentary presented to them, culminating in the published tentative drafts.



The published tentative drafts were distributed widely to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The ABA assigned the task of reviewing individual volumes to ABA sections whose members are expert in the specific areas covered by those volumes. Especially helpful during this review period were the comments, observations, and guidance provided by Professor Livingston Hall, Chairperson, Committee on Juvenile Justice of the Section of Criminal Justice, and Marjorie M. Childs, Chairperson of the Juvenile Justice Standards Review Committee of the Section of Family Law of the ABA. The recommendations submitted to the project by the professional groups, attorneys, judges, and ABA sections were presented to an executive committee of the joint commission, to whom the responsibility of responding had been delegated by the full commission. The executive committee consisted of the following members of the joint commission:

Chief Judge Irving R. Kaufman, *Chairman*  
Hon. William S. Fort, *Vice Chairman*  
Prof. Charles Z. Smith, *Vice Chairman*  
Dr. Eli Bower  
Allen Breed  
William T. Gossett, Esq.  
Robert W. Meserve, Esq.  
Milton G. Rector  
Daniel L. Skoler, Esq.  
Hon. William S. White  
Hon. Patricia M. Wald, *Special Consultant*

The executive committee met in 1977 and 1978 to discuss the proposed changes in the published standards and commentary. Minutes issued after the meetings reflecting the decisions by the executive committee were circulated to the members of the joint commission and the ABA House of Delegates, as well as to those who had transmitted comments to the project.

On February 12, 1979, the ABA House of Delegates approved seventeen of the twenty-three published volumes. It was understood that the approved volumes would be revised to conform to the changes described in the minutes of the 1977 and 1978 executive committee meetings. The *Schools and Education* volume was not presented to the House and the five remaining volumes—*Abuse and Neglect*, *Court Organization and Administration*, *Juvenile Delinquency and Sanctions*, *Juvenile Probation Function*, and *Noncriminal*

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*Misbehavior*—were held over for final consideration at the 1980 mid-winter meeting of the House.

Among the agreed-upon changes in the standards was the decision to bracket all numbers limiting time periods and sizes of facilities in order to distinguish precatory from mandatory standards and thereby allow for variations imposed by differences among jurisdictions. In some cases, numerical limitations concerning a juvenile's age also are bracketed.

The tentative drafts of the seventeen volumes approved by the ABA House of Delegates in February 1979, revised as agreed, are now ready for consideration and implementation by the components of the juvenile justice system in the various states and localities.

Much time has elapsed from the start of the project to the present date and significant changes have taken place both in the law and the social climate affecting juvenile justice in this country. Some of the changes are directly traceable to these standards and the intense national interest surrounding their promulgation. Other major changes are the indirect result of the standards; still others derive from independent local influences, such as increases in reported crime rates.

The volumes could not be revised to reflect legal and social developments subsequent to the drafting and release of the tentative drafts in 1975 and 1976 without distorting the context in which they were written and adopted. Therefore, changes in the standards or commentary dictated by the decisions of the executive committee subsequent to the publication of the tentative drafts are indicated in a special notation at the front of each volume.

In addition, the series will be brought up to date in the revised version of the summary volume, *Standards for Juvenile Justice: A Summary and Analysis*, which will describe current history, major trends, and the observable impact of the proposed standards on the juvenile justice system from their earliest dissemination. Far from being outdated, the published standards have become guideposts to the future of juvenile law.

The planning phase of the project was supported by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The National Institute also supported the drafting phase of the project, with additional support from grants from the American Bar Endowment, and the Andrew Mellon, Vincent Astor, and Herman Goldman foundations. Both the National Institute and the American Bar Endowment funded the final revision phase of the project.

An account of the history and accomplishments of the project

would not be complete without acknowledging the work of some of the people who, although no longer with the project, contributed immeasurably to its achievements. Orison Marden, a former president of the ABA, was co-chairman of the commission from 1974 until his death in August 1975. Paul Nejelski was director of the project during its planning phase from 1971 to 1973. Lawrence Schultz, who was research director from the inception of the project, was director from 1973 until 1974. From 1974 to 1975, Delmar Karlen served as vice-chairman of the commission and as chairman of its executive committee, and Wayne Mucci was director of the project. Barbara Flicker was director of the project from 1975 to 1976. Justice Tom C. Clark was chairman for ABA liaison from 1975 to 1977.

Legal editors included Jo Rena Adams, Paula Ryan, and Ken Taymor. Other valued staff members were Fred Cohen, Pat Pickrell, Peter Garlock, and Oscar Garcia-Rivera. Mary Anne O'Dea and Susan J. Sandler also served as editors. Amy Berlin and Kathy Kolar were research associates. Jennifer K. Schweickart and Ramelle Cochrane Pulitzer were editorial assistants.

It should be noted that the positions adopted by the Joint Commission and stated in these volumes do not represent the official policies or views of the organizations with which the members of the Joint Commission and the drafting committees are associated.

This volume is part of the series of standards and commentary prepared under the supervision of Drafting Committee II, which also includes the following volumes:

TRANSFER BETWEEN COURTS  
COURT ORGANIZATION AND ADMINISTRATION  
PROSECUTION  
THE JUVENILE PROBATION FUNCTION: INTAKE AND PRE-  
DISPOSITION INVESTIGATIVE SERVICES  
PRETRIAL COURT PROCEEDINGS  
ADJUDICATION  
APPEALS AND COLLATERAL REVIEW

*Addendum*  
*of*  
*Revisions in the 1977 Tentative Draft*

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As discussed in the Preface, the published tentative drafts were distributed to the appropriate ABA sections and other interested individuals and organizations. Comments and suggestions concerning the volumes were solicited by the executive committee of the IJA-ABA Joint Commission. The executive committee then reviewed the standards and commentary within the context of the recommendations received and adopted certain modifications. The specific changes affecting this volume are set forth below. Corrections in form, spelling, or punctuation are not included in this enumeration.

1. Standard 3.1(b) (ii) [c][2] was amended by deleting "other than himself or herself."

Commentary was revised by adding a statement that the standard does not preclude appointment of juvenile's counsel as guardian ad litem.

2. Standard 6.1 was amended by changing "subjudicial" to "non-judicial."

3. Standard 10.3(a) was amended by changing "should ordinarily" to "may."

Commentary was revised by noting that trial counsel should be retained unless appellate specialists are available.

4. Commentary to Standard 2.1(a) was revised by adding a reference to the position of the Legal Services and Defender Attorneys Juvenile Justice Standards Consortium (hereafter, Consortium) that state and local governments and legal services offices should be responsible for the provision of legal services in juvenile and family courts.

5. Commentary to Standard 2.2(a) was revised by adding a statement prepared by the Consortium describing a system for providing

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representation through a combined defender, neighborhood legal services, and appointed counsel plan.

6. Commentary to Standard 2.3 was revised by adding a distinction between unwaivable right to counsel at judicial proceedings and waivable right to counsel at post-adjudication administrative proceedings, with a cross-reference to *Corrections Administration* Standard 8.9 C.

7. Commentary to Standard 3.2 was revised by adding a comment on possible conflicts of interest between siblings who are represented by the same counsel in dependency or neglect proceedings and on the need for separate counsel if conflict exists.

8. Commentary to Standard 6.3(b) was revised by expanding the discussion of the strict safeguards imposed by the standards to protect juveniles who deny guilt from being persuaded to plead guilty to lesser charges or otherwise participate through counsel in plea negotiations. Cross-references to *Adjudication* and *Prosecution* standards were added.

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## *Introduction*

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### JUVENILE REPRESENTATION AND THE PRINCIPLE OF ADVOCACY

There has always been sharp controversy regarding the propriety and role of counsel in juvenile court proceedings. Traditionally, cases involving children were considered "nonadversarial" with respect to both the relationship of the parties and the forms of procedure employed. The child's interest in the proceeding was assumed to be identical with that of the state, which claimed to seek only the child's welfare and not his or her punishment. There did not exist, accordingly, that adversity of interest among the parties which characterizes other civil or criminal proceedings. Given this premise, modes of trial and methods of protecting legal rights designed for cases involving frankly conflicting interests seemed inappropriate. Juvenile hearings were viewed not as a contentious process but as a therapeutic one. Informality and direct communication between judge and child replaced demonstration by ordinary rules of procedure and evidence as vehicles for eliciting needed information concerning the child's circumstances and, as well, for imparting to children, or sometimes their parents, a sense of social responsibility.

It is not surprising that, in such a forum, legal representation was thought unnecessary and even undesirable. The participation of counsel, according to one standard treatise, "usually complicates the proceedings and serves neither the interests of the child nor the interests of justice. The better juvenile courts have been successful in discouraging the appearance of attorneys in most cases." H. Lou, *Juvenile Courts in the United States* 137-38 (1927). Indeed, most courts were successful in this endeavor; prior to 1967 it typically happened that fewer than 10 percent—and often fewer than 5 percent—of those before juvenile tribunals received legal assistance. President's Commission on Law Enforcement and Administration of Criminal Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 82 (1967). Thus, despite significant judicial and statu-

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tory movement toward provision of counsel in a handful of jurisdictions, broad recognition of the importance of representation was not achieved until the Supreme Court in *In re Gault*, 387 U.S. 1 (1967), held it a matter of constitutional right for delinquency proceedings.

With *Gault*, however, expressions of good intention and references to *parens patriae* could no longer justify denial of access to counsel to juveniles. Legal assistance was necessary, the Court held, to allow the respondent to "cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." No less than an adult faced with felony charges, "The child requires the guiding hand of counsel at every stage in the proceedings against him." *Id.* at 36. *Gault* thereby established the importance of legal representation in delinquency matters, while at the same time extending to juvenile respondents the privilege against self-incrimination and rights to notice of charges and confrontation of witnesses. The case did not, however, entirely clarify the nature of juvenile court proceedings nor the role of counsel participating in them. Judges and others have pointed to the limits placed by the Court on its holding, and to the desire expressed in *Gault* (and in subsequent decisions) for retention of the benevolent aspects of the juvenile justice system, as support for maintaining as far as possible the traditional nonadversary approach. See W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 32-37 (1972). (Hereinafter cited as Stapleton & Teitelbaum).

The post-*Gault* effort to accommodate traditional juvenile court theory and the requirement of counsel resulted, for some, in a fundamental redefinition of counsel's function. Many have suggested that attorneys for children abandon the sharply defined role of the advocate for a "guardianship" theory of representation. As a "guardian," counsel is primarily concerned with ascertaining and presenting the plea and program best calculated to serve the child's perceived welfare. *E.g.*, Isaacs, "The Role of Counsel in Representing Minors in the New Family Court," 12 *Buff. L. Rev.* 501, 506-07 (1963). Others have urged an "amicus curiae" function, in which counsel acts largely as an intermediary between the participants and explains the significance of proceedings to the client. See Cayton, "Relationship of the Probation Officer and the Defense Attorney After *Gault*," 34 *Fed. Prob.* 8, 10 (1970). See also Skoler & Tenney, "Attorney Representation in Juvenile Court," 4 *J. Fam. L.* 77 (1964); Stapleton & Teitelbaum, *supra* at 64-65. It is apparent that both guardianship and amicus curiae approaches involve radical

modification of the rules governing a lawyer's professional role. At the very least, either approach places on counsel responsibility for decisions ordinarily allocated to the client. For example, whether to admit or contest the charges may become a matter to be determined by the attorney, perhaps in consultation with probation staff and parents, rather than by the respondent. *E.g.*, Edelstein, "The Duties and Functions of the Law Guardian in the Family Court," 45 *N.Y.S.B.J.* 183, 184 (1973). Either of these approaches may also shift from client to counsel responsibility for the exercise of the privilege against self-incrimination, as suggested by the statement, "A sensitive lawyer, like a sensitive judge or a sensitive social worker, knows when confession is good for the soul." Coxe, "Lawyers in Juvenile Court," 13 *Crime & Delinq.* 488, 490 (1967). Moreover, a lawyer who seeks to block presentation of complete and accurate information to the court through, for example, a motion to suppress illegally obtained evidence might be accused by proponents of this redefined role of frustrating the court's proper functioning. See Kay & Segal, "The Role of the Attorney in Juvenile Court: A Non-Polar Approach," 61 *Geo. L. J.* 1401, 1412-13 (1973). It has further been suggested that counsel is affirmatively required to disclose any information, including that derived from a confidential communication, which bears on the child's need for treatment. See NCCD, *Procedure and Evidence in Juvenile Court* 43 (1962); Steinfeldt, Kerper & Friel, "The Impact of the *Gault* Decision in Texas," 20 *Juv. Ct. Judges J.* 154 (1969).

The standards set forth in this volume generally reject both guardianship and amicus curiae definitions of counsel's role and require instead that attorneys in juvenile court assume those responsibilities for advocacy and counseling which obtain in other areas of legal representation. Accordingly, counsel's principal function is a derivative one; it lies in furthering the "lawful objectives of his client through all reasonably available means permitted by law." ABA, *Code of Professional Responsibility* DR 7-101(A). Generally, determination of those objectives—whether to admit or deny, to press or abandon a claim, and the like—is the responsibility of the client whose interests will be affected by the proceeding. Attorneys may urge one course or another, but may not properly arrogate the final decision to themselves. *Id.* at EC 7-7, 7-8. Once the objective has been chosen by the client, the lawyer is bound by that choice, and must take care to conduct all phases of his or her professional activity, even those largely committed to counsel's discretion, in a manner consistent with the client's instructions in the matter. *Id.* at EC 7-9.

Reliance on the generally accepted standards of professional con-

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duct in legal representation is justified and indeed demanded by the purposes for which those standards were created. The lawyer's role is defined by a set of rules for behavior which are thought desirable because they advance certain fundamental values or goals of the legal process. These goals are generally shared, with some variations, by all elements of the American justice system, including that of the juvenile court.

Perhaps the most important goal of any justice system lies in providing a forum for enforcing those claims that the substantive law creates. Without such a forum, legal rights and benefits—together with the political and social principles they embody—are largely meaningless. The rules adopted by a legal system must therefore be such as to facilitate the presentation of lawful issues for authoritative resolution. That value generally shapes the rules of civil and criminal procedure; it is also central to the set of rules governing the conduct of counsel, as the *ABA Code of Professional Responsibility* expressly recognizes:

The duty of the lawyer, *both to his client and to the legal system*, is to represent his client zealously within the bounds of the law. . . . The professional responsibility of the lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

EC 7-1 (emphasis added). This statement clearly indicates the relationship between the goals of the legal system and the rules that require counsel to seek the lawful objectives of the client rather than those counsel may think wise or proper. For lawyers systematically to do other than assist their clients in obtaining adjudication of a claim, issue or defense available under the law would effectively limit if not destroy that claim, issue or defense. If an attorney, for example, must or even may refuse to participate in a denial on behalf of a defendant known to be guilty, then the latter has lost, for all practical purposes, the right to put the state to its burden of proof before conviction and sentence. The United States Supreme Court has taken much the same position in holding that counsel on appeal must assume an advocacy function rather than serve merely as an *amicus curiae*, informing the court of counsel's opin-

ion concerning the merits of the appeal. *Anders v. California*, 386 U.S. 730, 741, 743 (1967); *Ellis v. United States*, 356 U.S. 674 (1958).

Identification of an attorney with the client's objectives also serves a second value shared by civil and criminal justice systems: the accurate determination of factual and legal propositions. The common mechanism used for implementing this goal is the adversary mode of proof, the "competitive system in the administration of law." Cheatham, "The Lawyer's Role and Surroundings," 25 *Rocky Mtn. L. Rev.* 405, 409 (1960). In both systems, responsibility is placed on the parties themselves for investigation, development and presentation of issues of law and fact in the belief that, because of their respective self-interest, they will have the strongest motivation to bring all material evidence and argument to the court's attention. The resulting demonstration will, it is assumed throughout our legal process, best enable judge or jury to determine the truth of the positions asserted. See E. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 1 (1965); *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* 11 (1963). Since the adversary system relies on partisan presentation to inform the trier of fact, it is rational and indeed necessary to have rules of professional behavior associating counsel's conduct with the interest of the client. As the Supreme Court observed with respect to appellate matters, a procedure in which counsel acts "merely as *amicus curiae*" does not provide "that full consideration and resolution of the matter as is obtained when counsel is acting in [an advocacy] capacity." *Anders v. California*, 386 U.S. 738, 743 (1967).

These political and instrumental goals, and hence the rules they generate, are as important to juvenile court proceedings as to other civil or criminal matters. While the juvenile justice system retains a number of distinctive and significant features, it cannot still be maintained that juveniles facing deprivation of liberty have no cognizable claim under law apart from those asserted by the state on their behalf. By necessary implication, the traditional juvenile court view claiming identity of interest between the state and the accused juvenile has been rejected in favor of recognition of a privilege in juvenile respondents to withhold cooperation in proceedings that may affect their liberties. In this connection, it is important that the Supreme Court, in extending the privilege against self-incrimination to delinquency proceedings, did so not only out of concern for untrustworthy confessions, but also because children, like adults, may

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claim a measure of distance from the state in actions which may result, however benevolent the motivation, in a substantial restriction of freedom. As Mr. Justice Fortas observed:

[T]he roots of the privilege [against self-incrimination] tap the basic stream of religious and political principle, because the privilege reflects the limits of the individual's attornment to the State and—in a philosophical sense—insists upon the equality of the individual and the State. . . . One of its purposes is to prevent the State, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the State in securing his conviction.

*In re Gault*, 387 U.S. 1, 47 (1967). The respondents' right to decide whether to assist the state necessarily assumes that they are entitled to define their own interest in the proceeding and to do so in a manner different from that urged by the state. The Supreme Court has also rejected the notion that youthful respondents, by reason of their "dependent" status, generally have no right to liberty. In *Gault* the Court referred to, but did not approve, the proposition that "a child, unlike an adult, has a right 'not to liberty, but to custody'" and repeatedly emphasized the gravity of intervention from the child's perspective. In *In re Winship*, 397 U.S. 358 (1970), the Court further recognized that, in delinquency matters as in prosecutions for crime, "The accused has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by conviction." *Id.* at 365-66. And, most recently, the Supreme Court has held that both the function and the consequences of delinquency proceedings are virtually identical to those characterizing criminal prosecutions. Each system is "designed 'to vindicate [the] very vital interest in enforcement of criminal laws,'" *Breed v. Jones*, 421 U.S. 519, 531 (1975), a goal clearly independent of that held by the accused. Nor, the Court reaffirmed, can any useful distinction be drawn between the consequences of delinquency matters and those associated with the criminal process. "The fact 'that the purpose of [juvenile court] commitment is rehabilitative and not punitive [does not] change its nature. . . . The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken. Incarceration of adults is also intended to produce rehabilitation.'" *Id.* at 530, n. 12, quoting *Fain v. Duff*, 488 F. 2d 218, 225 (5th Cir.

1973). See also *In re Gault*, 387 U.S. 1, 50 (1967); *In re Winship*, 397 U.S. 358, 367 (1970).

Once the traditional premise of identity of interest between the state and the juvenile in delinquency proceedings is impeached, the related notion—that adversarial procedures ought to be avoided in a noncontentious forum—becomes flawed as well. Even on its own terms, traditional juvenile court disapproval of adversarial techniques found slight justification.\* There is no reliable evidence that use of non-adversarial procedure achieves greater accuracy than the method which American courts of civil and criminal jurisdiction generally employ. Nor, for that matter, is there good reason to believe that civil law courts, which typically employ a modified inquisitorial mode of proof, systematically reach more accurate or just results. The Supreme Court concluded that reliance on informal and noncontentious practice results in “unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.” *In re Gault*, 387 U.S. 1, 18-20 (1967). Accordingly, the goals of adequate disclosure of all relevant information and the achieving of just results in juvenile proceedings can best be obtained by counsel assuming in the juvenile court the functions of counselling and advocacy in the same manner as in other courts of civil and criminal jurisdiction.

While most of the decisional law concerning rights of persons before the juvenile court is concerned with delinquency proceedings, the same rationales apply to the role of counsel in other juvenile court matters. As in prosecutions for crime or delinquency, respondents alleged to be in need of supervision are subject to deprivation of liberty, including institutional commitment, for what may be the duration of their minority. And while stigmatization may be of a different or less aggravated kind, it presumably still exists since a disadvantageous label is applied to the child as a result of the adjudication. In child protective proceedings as well, the respondent—here the parent or guardian—faces a grave penalty in the substantial restriction of his or her constitutionally recognized interest in the custody of a child. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *In re B*, 30 N.Y.2d 352, 334 N.Y.S.2d 133 (1972). Again, as with delinquency and supervision matters, it is little more than wordplay to insist that the interests of the state and respondent—one seeking to take custody and the other to maintain it—are

\*Indeed, it is doubtful that references to the “nonadversary” character of the court had much to do with the manner of proof; rather the phrase usually reflected the notion of identity of interest.



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coincidental rather than frankly adverse. Nor, of course, could it be urged that accuracy in factual and legal decisions is less important in these areas.

### THE RELEVANCE OF THE CLIENT'S YOUTH

It has sometimes been suggested that all or most of a juvenile court lawyer's clientele is not sufficiently mature to instruct counsel in any usual sense and that counsel must, therefore, usually act as guardian or amicus curiae. The proponents of this view often tend, however, to equate competence with capacity to weigh accurately all immediate and remote benefits or costs associated with the available options. In representing adults, wisdom of this kind is not required; it is ordinarily sufficient that clients understand the nature and purposes of the proceedings, and its general consequences, and be able to formulate their desires concerning the proceeding with some degree of clarity. Most adolescents can meet this standard, and more ought not be required of them. To do so would, in effect, reintroduce the identification of state and child by imposing on respondents an "objective" definition of their interests.

It is, of course, true that "the responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . or the nature of the particular proceeding." ABA, *Code of Professional Responsibility* EC 7-11. Attorneys will sometimes be required, by reason of their clients' youth and inexperience, to take special pains in explaining the nature and potential results of the action and to investigate formal and informal dispositional alternatives in their clients' interests. See, e.g., §§ 6.2, 8.1 and 9.3, *infra*. And, particularly where counsel represents a very young client (ordinarily but not always in connection with a child protective, custody or adoption matter), it will in some cases happen that the client is incapable of rational consideration regarding the proceeding. Where this is true, attorneys may be required to abandon their role as advocate. See § 3.1(b), *infra*. However, the occasions for doing so are rare—particularly in delinquency and supervision cases—and may not properly be extended through manipulation of the general standard for competence.

### THE LAWYER AS COUNSELOR

Adoption of an advocacy role for purposes of juvenile court proceedings does not imply that lawyers should limit their concern

or activity to the legal requirements of those proceedings. They not only may, but ordinarily should, be prepared to assume responsibility for counseling the client and, in some cases, the client's family with respect to legal and nonlegal matters independent of pending or contemplated litigation.

The existence of such a role for an attorney has long been recognized in a variety of kinds of practice. In commercial law, it has been said that "[c]ounseling, with the idea of avoiding future controversies and litigation, is the lawyer's most useful role." R. Braucher & A. Sutherland, Jr., *Commercial Transactions: Text—Cases—Problems* 37 (3rd ed. 1964). Tax counseling is thought an important device to "improve the tax morality of the community." Hellerstein, "Ethical Problems in Office Counselling," 8 *Tax L. Rev.* 4, 9 (1952). In matrimonial cases, it has increasingly been emphasized, lawyers must be prepared to assume responsibility for guidance beyond the strict legal requirements of processing the action and negotiating property or custody agreements. C. Foote, R. Levy & F. Sander, *Cases and Materials on Family Law* 8-10 (1966); Watson, "The Lawyer as Counselor," 5 *J. Fam. L.* 7 (1965).

Recognition of the attorney's function as counselor seems particularly appropriate for juvenile court representation. In most instances, neither clients nor their families will be familiar with the juvenile court or its procedures, goals and powers. It will, ordinarily, fall to the lawyer to understand and allay their spoken and unspoken fears about the situation in which they find themselves. H. Freeman & H. Weihofen, *Clinical Law Training* 454 (1972). In addition to his or her capacity as interpreter of specific procedures and rules, the attorney may also become "the first law figure who has performed a helpful function" for the client. Paulsen, "The Expanding Horizons of Legal Services: II," 67 *W. Va. L. Rev.* 267, 276 (1965). As such, counsel has a unique opportunity to explain legal and social propositions in an acceptable fashion to clients whose feelings are often colored by hostility to authoritarian figures and rules. Counsel should also attempt to ascertain whether non-legal services are needed by the client and the client's family and to assist them in taking advantage of such services if they are available. Performance of these duties will not, it should be emphasized, involve compromise of the obligation to advocate the client's interests before the court, so long as the distinction between counseling and ultimate determination of interests in the matter is observed. See ABA, *Code of Professional Responsibility* EC 7-3.

## *Standards Without Commentary*

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### **PART I. GENERAL STANDARDS**

#### **1.1 Counsel in juvenile proceedings, generally.**

The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

#### **1.2 Standards in juvenile proceedings, generally.**

(a) As a member of the bar, a lawyer involved in juvenile court matters is bound to know and is subject to standards of professional conduct set forth in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. Counsel has no duty to execute any directive of the client that is inconsistent with law or these standards. Counsel may, however, challenge standards that he or she believes limit unconstitutionally or otherwise improperly representation of clients subject to juvenile court proceedings.

(b) As used in these standards, the term "unprofessional conduct" denotes conduct which is now or should be subject to disciplinary sanction. Where other terms are used, the standard is intended as a guide to honorable and competent professional conduct or as a model for institutional organization.

#### **1.3 Misrepresentation of factual propositions or legal authority.**

It is unprofessional conduct for counsel intentionally to misrepresent factual propositions or legal authority to the court or to opposing counsel and probation personnel in the course of discussions concerning entrance of a plea, early disposition or any other matter related to the juvenile court proceeding. Entrance of a plea concerning the client's responsibility in law for alleged mis-

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conduct or concerning the existence in law of an alleged status offense is a statement of the party's posture with respect to the proceeding and is not a representation of fact or of legal authority.

### 1.4 Relations with probation and social work personnel.

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

### 1.5 Punctuality.

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

### 1.6 Public statements.

(a) The lawyer representing a client before the juvenile court should avoid personal publicity connected with the case, both during trial and thereafter.

(b) Counsel should comply with statutory and court rules governing dissemination of information concerning juvenile and family court matters and, to the extent consistent with those rules, with the *ABA Standards Relating to Fair Trial and Free Press*.

### 1.7 Improvement in the juvenile justice system.

In each jurisdiction, lawyers practicing before the juvenile court should actively seek improvement in the administration of juvenile justice and the provision of resources for the treatment of persons subject to the jurisdiction of the juvenile court.

## **PART II. PROVISION AND ORGANIZATION OF LEGAL SERVICES**

### **2.1 General principles.**

#### **(a) Responsibility for provision of legal services.**

Provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups, individual practitioners and educational institutions to ensure that competent counsel and adequate supporting services are available for representation of all persons with business before juvenile and family courts.

(i) Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to represent parties involved in such matters.

(ii) Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.

(iii) Careful and candid evaluation of representation in cases involving children should be undertaken by judicial and professional groups, including the organized bar, particularly but not solely where assigned counsel—whether public or private—appears.

#### **(b) Compensation for services.**

(i) Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving children, including counseling and activities related to locating or evaluating appropriate community services for a client or a client's family.

(ii) Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents

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who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, *infra*, and if the parents understand that a lawyer's entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child's resources alone.

(iii) As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client's parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.

(iv) Lawyers employed in a legal and/or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.

(c) Supporting services.

Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.

(i) Where lawyers are assigned, they should have regular access to all reasonably necessary supporting services.

(ii) Where a defender system is involved, adequate supporting services should be available within the organization itself.

(d) Independence.

Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship.

## 2.2 Organization of services.

(a) In general.

Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for representation which combines defender and assigned counsel systems should be adopted.

(b) Defender systems.

(i) Application of general defender standards.

A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.

(ii) Facilities.

If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.

(iii) Specialization.

While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.

(iv) Caseload.

It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.

(c) Assigned counsel systems.

(i) An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.

(ii) Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her other special qualifications to serve in the case, without regard to the established sequence.

.3 Types of proceedings.

(a) Delinquency and in need of supervision proceedings.

(i) Counsel should be provided for any juvenile subject to delinquency or in need of supervision proceedings.

(ii) Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency or in need of supervision action, including mental competency, transfer, postdisposition, probation revocation, and classification,

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

**(b) Child protective, custody and adoption proceedings.**

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

**2.4 Stages of proceedings.**

**(a) Initial provision of counsel.**

(i) When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.

(ii) In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

**(b) Duration of representation and withdrawal of counsel.**

(i) Lawyers initially retained or appointed should continue their representation through all stages of the proceedings, unless geographical or other compelling factors make continued participation impracticable.

(ii) Once appointed or retained, counsel should not request leave to withdraw unless compelled by serious illness or other incapacity, or unless contemporaneous or announced future conduct of the client is such as seriously to compromise the lawyer's professional integrity. Counsel should not seek to withdraw on the belief that the contentions of the client lack merit, but should present for consideration such points as the client desires to be



raised provided counsel can do so without violating standards of professional ethics.

(iii) If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

### PART III. THE LAWYER-CLIENT RELATIONSHIP

#### 3.1 The nature of the relationship.

##### (a) Client's interests paramount.

However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.

##### (b) Determination of client's interests.

###### (i) Generally.

In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.

###### (ii) Counsel for the juvenile.

[a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.

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

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

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

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

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

(iii) Counsel for the parent.

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

### 3.2 Adversity of interests.

(a) Adversity of interests defined.

For purposes of these standards, adversity of interests exists when a lawyer or lawyers associated in practice:

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

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

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

(b) Resolution of adversity.

At the earliest feasible opportunity, counsel should disclose to

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

### 3.3 Confidentiality.

#### (a) Establishment of confidential relationship.

Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation and at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.

#### (b) Preservation of client's confidences and secrets.

(i) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal a confidence or secret of a client to another, including the parent of a juvenile client.

(ii) Except as permitted by 3.3(d), below, an attorney should not knowingly use a confidence or secret of a client to the disadvantage of the client or, unless the attorney has secured the consent of the client after full disclosure, for the attorney's own advantage or that of a third person.

#### (c) Preservation of secrets of a juvenile client's parent or guardian.

The attorney should not reveal information gained from or concerning the parent or guardian of a juvenile client in the course of representation with respect to a delinquency or in need of supervision proceeding against the client, where (1) the parent or guardian has requested the information be held inviolate, or (2) disclosure of the information would likely be embarrassing or detrimental to the parent or guardian and (3) preservation would not conflict with the attorney's primary responsibility to the interests of the client.

(i) The attorney should not encourage secret communications when it is apparent that the parent or guardian believes those communications to be confidential or privileged and disclosure may become necessary to full and effective representation of the client.

(ii) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal the parent's secret communication to others or use a secret communication to the parent's disadvantage or to the advantage of the attorney or of a third person, unless (1) the parent competently consents to such revelation or use after full

disclosure or (2) such disclosure or use is necessary to the discharge of the attorney's primary responsibility to the client.

(d) Disclosure of confidential communications.

In addition to circumstances specifically mentioned above, a lawyer may reveal:

(i) Confidences or secrets with the informed and competent consent of the client or clients affected, but only after full disclosure of all relevant circumstances to them. If the client is a juvenile incapable of considered judgment with respect to disclosure of a secret or confidence, a lawyer may reveal such communications if such disclosure (1) will not disadvantage the juvenile and (2) will further rendition of counseling, advice or other service to the client.

(ii) Confidences or secrets when permitted under disciplinary rules of the *ABA Code of Professional Responsibility* or as required by law or court order.

(iii) The intention of a client to commit a crime or an act which if done by an adult would constitute a crime, or acts that constitute neglect or abuse of a child, together with any information necessary to prevent such conduct. A lawyer must reveal such intention if the conduct would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes disclosure is necessary to prevent the harm. If feasible, the lawyer should first inform the client of the duty to make such revelation and seek to persuade the client to abandon the plan.

(iv) Confidences or secrets material to an action to collect a fee or to defend himself or herself or any employees or associates against an accusation of wrongful conduct.

#### 3.4 Advice and service with respect to anticipated unlawful conduct.

It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be illegal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

#### 3.5 Duty to keep client informed.

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

## PART IV. INITIAL STAGES OF REPRESENTATION

### 4.1 Prompt action to protect the client.

Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. Lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients' interests.

### 4.2 Interviewing the client.

(a) The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.

(b) In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

### 4.3 Investigation and preparation.

(a) It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.

(b) Where circumstances appear to warrant it, the lawyer should also investigate resources and services available in the community and, if appropriate, recommend them to the client and the client's family. The lawyer's responsibility in this regard is independent of the posture taken with respect to any proceeding in which the client is involved.

(c) It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.

### 4.4 Relations with prospective witnesses.

The ethical and legal rules concerning counsel's relations with lay

and expert witnesses generally govern lawyers engaged in juvenile court representation.

## PART V. ADVISING AND COUNSELING THE CLIENT

### 5.1 Advising the client concerning the case.

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

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

### 5.2 Control and direction of the case.

(a) Certain decisions relating to the conduct of the case are in most cases ultimately for the client and others are ultimately for the lawyer. The client, after full consultation with counsel, is ordinarily responsible for determining:

- (i) the plea to be entered at adjudication;
- (ii) whether to cooperate in consent judgment or early disposition plans;
- (iii) whether to be tried as a juvenile or an adult, where the client has that choice;
- (iv) whether to waive jury trial;
- (v) whether to testify on his own behalf.

(b) Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what jurors to accept and strike, what trial motions should be made, and any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client, are the exclusive province of the lawyer after full consultation with the client.

(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his or her advice and reasons, and the

conclusion reached. This record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

### 5.3 Counseling.

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

## PART VI. INTAKE, EARLY DISPOSITION AND DETENTION

### 6.1 Intake and early disposition, generally.

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

### 6.2 Intake hearings.

(a) In jurisdictions where intake hearings are held prior to reference of a juvenile court matter for judicial proceedings, the lawyer should be familiar with and explain to the client and, if the client is a minor, to the client's parents, the nature of the hearing, the procedures to be followed, the several dispositions available and their probable consequences. The lawyer should further advise the client of his or her rights at the intake hearing, including the privilege against self-incrimination where appropriate, and of the use that may later be made of the client's statements.

(b) The lawyer should be prepared to make to the intake hearing officer arguments concerning the jurisdictional sufficiency of the allegations made and to present facts and circumstances relating to the occurrence of and the client's responsibility for the acts or conditions charged or to the necessity for official treatment of the matter.

### 6.3 Early disposition.

(a) When the client admits the acts or conditions alleged in the juvenile court proceeding and after investigation the lawyer is satisfied that the admission is factually supported and that the court would have jurisdiction to act, the lawyer should, with the client's

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consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.

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

6.4 Detention.

(a) If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.

(b) Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.

(c) The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

PART VII. ADJUDICATION

7.1 Adjudication without trial.

(a) Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated pleas are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement where the prevailing law requires that such a plea be supported by an admission of responsibility in fact.

(b) The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency.



Where it appears that the client's participation in a psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

#### 7.2 Formality, in general.

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

#### 7.3 Discovery and motion practice.

##### (a) Discovery.

(i) Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.

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

##### (b) Other motions.

Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, to suppress evidence, for mental examination, or appointment of an investigator or expert witness, for severance, or to disqualify a judge. Such motions should ordinarily be made in writing when that would be required for similar motions in civil or criminal proceedings in the jurisdiction. If

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a hearing on the motion is required, it should be scheduled at some time prior to the adjudication hearing if there is any likelihood that consolidation will work to the client's disadvantage.

7.4 Compliance with orders.

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

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

7.5 Relations with court and participants.

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

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

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

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

7.6 Selection of and relations with jurors.

Where the right to jury trial is available and exercised in juvenile court proceedings, the standards set forth in sections 7.2 and 7.3 of the *ABA Standards Relating to the Defense Function* should generally be followed.

7.7 Presentation of evidence.

It is unprofessional conduct for a lawyer knowingly to offer false evidence or to bring inadmissible evidence to the attention of the trier of fact, to ask questions or display demonstrative evidence known to be improper or inadmissible, or intentionally to make im-

permissible comments or arguments in the presence of the trier of fact. When a jury is empaneled, if the lawyer has substantial doubt concerning the admissibility of evidence, he or she should tender it by an offer of proof and obtain a ruling on its admissibility prior to presentation.

#### 7.8 Examination of witnesses.

(a) The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client's interests. It is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests.

(b) The lawyer's knowledge that a witness is telling the truth does not preclude cross-examination in all circumstances, but may affect the method and scope of cross-examination. Counsel should not misuse the power of cross-examination or impeachment by employing it to discredit the honesty or general character of a witness known to be testifying truthfully.

(c) The examination of all witnesses should be conducted fairly and with due regard for the dignity and, to the extent allowed by the circumstances of the case, the privacy of the witness. In general, and particularly when a youthful witness is testifying, the lawyer should avoid unnecessary intimidation or humiliation of the witness.

(d) A lawyer should not knowingly call as a witness one who will claim a valid privilege not to testify for the sole purpose of impressing that claim on the fact-finder. In some instances, as defined in the *ABA Code of Professional Responsibility*, doing so will constitute unprofessional conduct.

(e) It is unprofessional conduct to ask a question that implies the existence of a factual predicate which the examiner knows cannot be supported by evidence.

#### 7.9 Testimony by the respondent.

(a) It is the lawyer's duty to protect the client's privilege against self-incrimination in juvenile court proceedings. When the client has elected not to testify, the lawyer should be alert to invoke the privilege and should insist on its recognition unless the client competently decides that invocation should not be continued.

(b) If the respondent has admitted to counsel facts which establish his or her responsibility for the acts or conditions alleged and if the lawyer, after independent investigation, is satisfied that those admissions are true, and the respondent insists on exercising the right to testify at the adjudication hearing, the lawyer must advise the cli-

ent against taking the stand to testify falsely and, if necessary, take appropriate steps to avoid lending aid to perjury.

(i) If, before adjudication, the respondent insists on taking the stand to testify falsely, the lawyer must withdraw from the case if that is feasible and should seek the leave of the court to do so if necessary.

(ii) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during adjudication without notice, it is unprofessional conduct for the lawyer to lend aid to perjury or use the perjured testimony. Before the respondent takes the stand in these circumstances the lawyer should, if possible, make a record of the fact that respondent is taking the stand against the advice of counsel without revealing that fact to the court. Counsel's examination should be confined to identifying the witness as the respondent and permitting the witness to make his or her statement to the trier of fact. Counsel may not engage in direct examination of the respondent in the conventional manner and may not recite or rely on the false testimony in argument.

#### 7.10 Argument.

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

### PART VIII. TRANSFER PROCEEDINGS

#### 8.1 In general.

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

#### 8.2 Investigation and preparation.

(a) In any case where transfer is likely, counsel should seek to discover at the earliest opportunity whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made.

(b) The lawyer should promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to

or may be considered by the court in the course of transfer proceedings. Where circumstances warrant, counsel should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protection of the client's rights.

### 8.3 Advising and counseling the client concerning transfer.

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

### 8.4 Transfer hearings.

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

### 8.5 Posthearing remedies.

If transfer for criminal prosecution is ordered, the lawyer should act promptly to preserve an appeal from that order and should be prepared to make any appropriate motions for posttransfer relief.

## PART IX. DISPOSITION

### 9.1 In general.

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

### 9.2 Investigation and preparation.

(a) Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices at the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.

(b) The lawyer should promptly investigate all sources of evidence, including any reports or other information that will be brought to the court's attention, and interview all witnesses material to the disposition decision.

(i) If access to social investigation, psychological, psychiatric

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or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.

(ii) Whether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

(c) The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.

9.3 Counseling prior to disposition.

(a) The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

(b) When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure.

(c) The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or, if the client is a juvenile, the history or condition of the client's parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

9.4 Disposition hearing.

(a) It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders rendered be based on adequate reliable evidence.

(i) Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.

(ii) The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

(b) The lawyer may, during disposition, ask that the client be excused during presentation of evidence when, in counsel's judgment, exposure to a particular item of evidence would adversely affect the well-being of the client or the client's relationship with his or her family, and the client's presence is not necessary to protecting his or her interests in the proceeding.

#### 9.5 Counseling after disposition.

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

### PART X. REPRESENTATION AFTER DISPOSITION

#### 10.1 Relations with the client after disposition.

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

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(i) If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.

(ii) Whether or not charges against the client have been dismissed, where the lawyer is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

(b) The decision to pursue an available claim for postdispositional relief from judicial and correctional or other administrative determinations related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment, is ordinarily the client's responsibility after full consultation with counsel.

**10.2 Postdispositional hearings before the juvenile court.**

(a) The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.

(b) The lawyer should advise the client of the pendency or availability of a postdispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client and of any material witnesses who may be called.

**10.3 Counsel on appeal.**

(a) Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent counsel available for assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel.

(b) Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's



parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.

(c) Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw from a case solely because his or her own analysis indicates that the appeal lacks merit.

#### 10.4 Conduct of the appeal.

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

#### 10.5 Postdispositional remedies: protection of the client's right to treatment.

(a) A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when postdispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

(b) Counsel representing a client in postdispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.

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

#### 10.6 Probation revocation; parole revocation.

(a) Trial counsel should be prepared to continue representation if revocation of the client's probation or parole is sought, unless new counsel is appointed or continued representation would, because of geographical or other factors, work unreasonable hardship.

(b) Where proceedings to revoke conditional liberty are conducted in substantially the same manner as original petitions alleg-

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**ing delinquency or need for supervision, the standards governing representation in juvenile court generally apply. Where special procedures are used in such matters, counsel should advise the client concerning those procedures and be prepared actively to participate in the revocation proceedings at the earliest stage.**

**10.7 Challenges to the effectiveness of counsel.**

**(a) A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel's actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued.**

**(b) A lawyer whose conduct of a juvenile court case is drawn into question may testify in judicial, administrative or investigatory proceedings concerning the matters charged, even though in so doing the lawyer must reveal information which was given by the client in confidence.**

## *Standards With Commentary*

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### PART I. GENERAL STANDARDS

#### 1.1 Counsel in juvenile proceedings, generally.

The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.

#### *Commentary*

The importance of legal assistance has long been appreciated in criminal prosecutions, first for capital crimes, *Powell v. Alabama*, 287 U.S. 45 (1932), later under "special circumstances," *Betts v. Brady*, 316 U.S. 455 (1942), then for all persons facing serious charges, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and most recently in all misdemeanors for which imprisonment might be ordered, *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In the *Powell* case, the Court sketched the benefits associated with advice of counsel in language which has become familiar.

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his case, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

*Powell v. Alabama*, 287 U.S. at 69.

In addition to providing critical assistance in the conduct of a specific proceeding, the presence of counsel contributes significantly

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to the integrity of the judicial system and to its perceived legitimacy for those who come before it and for the public in general. See *Mayberry v. Pennsylvania*, 400 U.S. 455, 468 (1971) (Burger, C.J., concurring).

The lawyer's contribution to juvenile court matters is much the same as that which characterizes his or her professional role in criminal and civil matters generally. See Introduction. With respect to proceedings before the court, counsel is an important part of what has been called, in the criminal justice system, the "tripartite entity" constituted to resolve disputes between individuals and the state. See ABA, *Standards Relating to the Defense Function* § 1.1(a). In earlier phases of the juvenile justice process the lawyer's services as counselor and advocate are important to realization of the benefits of early disposition and diversion from formal agencies. Finally, an attorney may perform distinct counseling functions with respect to location and provision of appropriate nonlegal assistance within and without the court system. Such activities require a sense of professional responsibility to the client, the skill to present the client's position in legal and administrative forums, and the ability both to investigate that which seems good for the client and to distinguish the attorney's opinion from the position that the client is entitled by law to take. These, among others, are functions for which lawyers are or should be specially qualified and which, as experience has amply demonstrated, are not readily assumed by other available representatives for juvenile court clientele. See, *e.g.*, *In re Gault*, 387 U.S. 1, 36 (1967).

1.2 Standards in juvenile proceedings, generally.

(a) As a member of the bar, a lawyer involved in juvenile court matters is bound to know and is subject to standards of professional conduct set forth in statutes, rules, decisions of courts, and codes, canons or other standards of professional conduct. Counsel has no duty to exercise any directive of the client that is inconsistent with law or these standards. Counsel may, however, challenge standards that he or she believes limit unconstitutionally or otherwise improperly representation of clients subject to juvenile court proceedings.

*Commentary*

It is intrinsic to practice of a profession that members know the ethical and legal rules which govern their professional conduct and that they conform their behavior to these requirements. These stan-

dards consistently propose, for reasons set forth in the Introduction, that the current rules of legal professional conduct, which treat advocacy as well as counseling activities, govern juvenile court as well as other kinds of representation. Adherence to accepted principles of professional behavior is particularly important where those with whom an attorney comes into regular contact—including judges and probation officers—hold expectations at variance with the lawyer's traditional duties of loyalty and zeal in pursuing all claims or defenses that may lawfully be presented. *E.g.*, W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 130-34, 158-63 (1972); McKesson, "Right to Counsel in Juvenile Proceedings," 45 *Minn. L. Rev.* 843, 846-47 (1961); Dootjes, Erickson & Fox, *Defence Counsel in Juvenile Court: A Variety of Roles*, 14 *Canadian Journal of Criminology and Corrections* 132 (1972). The consequences of abandoning those rules will likely be measured not only in uncertainty and discomfort for the attorney but in the compromise of constitutional privileges and in loss of confidence in the integrity of the juvenile justice system.

#### 1.2(b)

As used in these standards, the term "unprofessional conduct" denotes conduct which is now or should be subject to disciplinary sanction. Where other terms are used, the standard is intended as a guide to honorable and competent professional conduct or as a model for institutional organization.

#### *Commentary*

The term "unprofessional conduct" refers to violations of counsel's duty which are so clear and so grave in consequence that their breach, upon detection, should be followed by professional discipline in some appropriate form. In virtually every instance the behavior so categorized is already subject to sanction under existing disciplinary rules and has been similarly treated by the ABA, *Standards Relating to the Defense Function* in adult criminal cases. Where other terms are used in these standards to describe professional behavior, such as "the lawyer should," the standard does not necessarily imply a disciplinary rule, but is intended to provide a guide to adequate representation.

In one important respect these standards are less modest than their criminal court counterpart. Section 1.1(f) of the latter states: "These standards are [not] intended . . . as criteria for judicial evalu-

ation of the effectiveness of counsel to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation of the effectiveness of counsel, depending upon all the circumstances." That limitation does not appear in the present standard. It is hoped that reference will be made to the principles of representation here set forth in determining whether, under all the circumstances, a juvenile court client has received competent assistance of counsel. In this connection it is important to note that several courts have implicitly or expressly relied on the Criminal Justice Standards in departing from the traditional "mockery of justice" or "gross incompetence" tests. See Bazelon, "The Defective Assistance of Counsel," 42 *U. Cin. L. Rev.* 1, 28-29 (1973). The Fourth Circuit Court of Appeals, for example, has delineated positive duties very much like those set forth in the current *ABA Standards Relating to the Defense Function* upon which competence of representation is to be judged. *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968).

The Wisconsin Supreme Court has also adopted, prospectively, the *ABA Standards Relating to the Defense Function* in criminal cases as "partial guidelines to the determination of effective representation." *State v. Harper*, 57 Wis.2d 543, 205 N.W.2d 1, 9 (1973). The potential significance of the standards in evaluating adequacy of representation is strikingly revealed in *Harper*. In that case, the Wisconsin court adhered to the "mockery of justice" test and affirmed a conviction where counsel did not interview his client before trial, failed to present timely notice of an alibi defense (effectively vitiating that defense at trial), did not investigate the case or inspect police records which apparently were readily available to him, and overlooked entirely an arguable motion to suppress critical evidence against the defendant. See also *United States v. DeCoster*, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973).

It is not, of course, true that inadequate representation has been afforded whenever counsel's conduct departs from these standards, nor that deviation from any standard necessarily implies that representation has been constitutionally defective. Nevertheless, it does not seem too much to say that resort to the standards may often or even generally be useful in evaluating the competence of representation.

### 1.3 Misrepresentation of factual propositions or legal authority.

It is unprofessional conduct for counsel intentionally to misrepresent factual propositions or legal authority to the court or to opposing counsel and probation personnel in the course of discus-

sions concerning entrance of a plea, early disposition or any other matter related to the juvenile court proceeding. Entrance of a plea concerning the client's responsibility in law for alleged misconduct or concerning the existence in law of an alleged status offense is a statement of the party's posture with respect to the proceeding and is not a representation of fact or of legal authority.

*Commentary*

**Misrepresentation, Generally.** Counsel's duty of candor and honesty in his or her relations with the court has always been considered fundamental. ABA, *Code of Professional Responsibility* DR 1-102; ABA, *Standards Relating to the Defense Function* § 1.1(d). This responsibility is properly viewed by the *Code* as part of the duty of lawyers to the legal system itself, rather than as a special duty they owe to the court as "officers" thereof. See *Code, supra* at 81-86. The adversary process of proof taking has never implied knowing deception of the court or its agents; indeed, such an implication would disserve the goal of accurate fact determination for which adversariness is employed in both civil and criminal justice systems.

The same considerations require attorneys to be candid and honest in their dealings with nonjudicial agents in the course of juvenile court representation. Conscious deception of opposing counsel, including statements made during plea discussions, has traditionally been ground for disciplinary action. ABA, *Standards Relating to the Defense Function* § 6.2(b) and Commentary thereto; *Monroe v. State Bar*, 55 Cal.2d 145, 358 P.2d 529, 533 (1961). This standard applies that rule to all discussions between defense counsel and probation or social work personnel concerning matters arising in the course of juvenile court proceedings. Misconduct of this kind is not only demeaning to the attorney's professional status but destructive of the continuing relationships between counsel and nonlegal court staff that characterize juvenile court practice.

It should, therefore, be deemed unprofessional conduct for a lawyer to misrepresent facts or law in discussions concerning informal or early disposition programs, or to present a plan for release, diversion or disposition that the lawyer knows to be unfeasible or with which he or she knows a client will not cooperate. Of course, the requirement of candor neither requires nor permits disclosure of privileged matters unless informed consent has been given. See ABA, *Standards Relating to the Defense Function*, Commentary to § 6.2(b).

**Pleading in Juvenile Cases.** The last sentence of this standard adopts the principle that entrance of a plea concerning the client's responsibility in law for alleged misconduct or concerning the existence in law of an alleged status offense (e.g. truancy or incorrigibility) is a statement of the party's posture with respect to the proceeding and is not a representation of fact or law. This is the view taken in prosecutions for crime and flows from the defendant's privilege of putting the state to its burden of proof. W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 115 (1972); ABA, *Standards Relating to the Prosecution Function and the Defense Function* 5. Because of the potentially overwhelming power of the government acting as prosecutor on the one hand, and the grave consequences of conviction for the defendant on the other, it has become a tenet of our political philosophy that an individual is entitled to claim a substantial distance from the state acting penally. The principle that forbids compelling a person to cooperate in his or her own conviction is "the result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the state on the other." *Brown v. Walker*, 161 U.S. 591, 637 (1896); see E. Griswold, *The Fifth Amendment Today* 8 (1955). Accordingly, the accused is not subject to all the requirements of candor and cooperation imposed on parties to civil actions; the criminal defendant need not disclose virtually all material information to the opponent nor must he or she participate testimonially in the proceeding. The political distance between government and individual is reflected in the plea-taking process as well as in the operation of the Fifth Amendment. Entrance of a "not guilty" plea does not signify an allegation of fact by the defendant. It is never given on oath and means only that the accused asserts the right to freedom until guilt has been proved beyond a reasonable doubt, by lawful evidence and according to proper procedure. Stapleton & Teitelbaum, *supra*.

With respect to delinquency proceedings, clear support for the existence of this privilege to put the state to its burden is found in *In re Gault*, 387 U.S. 1 (1967). In extending the privilege against self-incrimination to juveniles, the Court expressly recognized the right of one faced with deprivation of liberty to refuse assistance to the state in that endeavor. See *In re Gault*, 387 U.S. 1, 47 (1967). Precisely the same principle is incorporated in employment of the plea as a device for expressing the respondent's desire to put the state to its burden of proof.

The same rationale is applicable to in need of supervision pro-



ceedings. The respondent is always subject to stigmatization and deprivation of liberty, including placement in a secure facility, and in many cases for virtually the same reasons that obtain in delinquency matters. Thus, grave consequences attend a finding of need for supervision and, of course, the interested participation of the state is directed against the child. Indeed, the risk of overwhelming the respondent seems peculiarly high in PINS (persons in need of supervision) matters since, typically, the child cannot look to his or her parents for substantial support.

With regard to child protective proceedings, the parent may suffer substantial restriction of his or her constitutionally recognized interest in the custody of a child. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *In re B*, 30 N.Y.2d 352, 334 N.Y.S.2d 133 (1972). Stigmatization of the parent labeled "neglectful" is inevitable and perhaps severe, since removal of the child will be obvious to the community and to other interested persons. Accordingly, it seems appropriate to allow respondents in neglect or dependency proceedings to insist that the state, when seeking such results, bear the applicable burden of proof without demanding the cooperation of the respondents.

#### 1.4 Relations with probation and social work personnel.

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

#### *Commentary*

It is a salient aspect of juvenile court practice that lawyers often deal with social work and probation personnel throughout the course of their relationship with a case. If a child is on probation at the time of the immediate proceeding, for example, counsel will be subject to a court-ordered duty to cooperate in certain ways with the probation staff. In addition, the great preponderance of urban juvenile court clientele receive welfare benefits of some kind, usually Aid to Dependent Children, and are subject to more or less formal scrutiny of their family relationships. Because of this contact social welfare employees are often responsible for initiating and prosecuting child protective proceedings against the recipients whom they supervise.

See Comment, "Representation in Child-Neglect Cases: Are Parents Neglected," 4 *Colum. J. of Law & Social Prob.* 230, 236-38 (1968). Within the juvenile justice system, of course, probation staff play various crucial roles at detention, intake and disposition. Where prosecuting attorneys do not regularly participate in presenting the allegations against a respondent, probation officers may carry that responsibility at adjudication in addition to any testimonial requirements.

This frequent and close interprofessional contact creates special, delicate problems for both professions. In some situations, the functions of lawyers and social workers may bring them into frank conflict. The latter may, for example, have a responsibility to investigate the case with a view toward presenting evidence of neglect or, in the case of a child on probation, delinquency. In doing so, the social worker's inquiry often extends to identifying and seeking to remedy deviation from psychological, social and economic, as well as legal, norms. Tappan, "The Nature of Juvenile Delinquency," in *R. Giallombardo, Juvenile Delinquency: A Book of Readings* 3, 4-6 (2nd ed. 1972). Accordingly, a social worker will seek all information concerning the child and, in many cases, the entire family. An attorney representing a child or the parent in such a matter occupies a different role and employs a different perspective. For purposes of advocacy—as opposed to counseling—an attorney's principal concern lies with proof of violation of a specific legal norm. Mindful of the uses to which statements by a client or a client's family may be put and of their privacy interests, the attorney will sometimes be interested in limiting some aspects of the social worker's or probation officer's investigation.

The difference in legal and social work orientation is also significant in interprofessional relationships within the juvenile court process. In the first place, different emphases lead in some cases to disagreement concerning the functions that each professional should perform at various stages of the process. See Dootjes, Erickson & Fox, "Defence Counsel in Juvenile Court: A Variety of Roles," 14 *Canadian Journal of Criminology and Corrections* 132 (1972); Brennan & Khinduka, "Role Expectations of Social Workers and Lawyers in the Juvenile Court," 17 *Crime & Delinq.* 191 (1971). Of greater import are differences concerning the nature and significance of issues at the various stages of juvenile proceedings. For a probation officer at intake or adjudication, the basic issue may be defined in terms of the client's or family's need for assistance. "Technical" questions of the jurisdictional sufficiency of a complaint tend to appear less important than delivery of services and

rehabilitation of problem children. See Erickson, "The Defence Lawyer's Role in Juvenile Court: An Empirical Investigation Into Judges' and Social Workers' Points of View," 24 *U. Toronto L. J.* 126, 146 (1974); Cayton, "Relationship of the Probation Officer and the Defense Attorney After *Gault*," 34 *Fed. Prob.* 8, 11 (1970). A lawyer, on the other hand, by training and through the advocate's role, views the existence of an adequate jurisdictional basis as the necessary precondition to coercive intervention in a person's life. Moreover, the lawyer properly views himself or herself as an agent of the client who is, if so instructed, both entitled and required to insist that jurisdiction be established by the prosecution through fair procedure—that is, by due process.

Dispositional postures will also be affected by the distinctive role definitions of each profession. The casework approach of the social worker and probation officer looks to prevention of further deviant behavior through rehabilitation of individuals and emphasizes the expertise and good faith of the official presenting correctional information. See F. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training* 13-14 (1969). Lawyers, on the contrary, generally represent their clients' expressed interests, which often requires advocacy for the least drastic form of intervention available. Counsel will, therefore, often be in the position of arguing for an outcome which, from the social worker's view, is unlikely to effect rehabilitation. Moreover, in the course of advocacy at disposition, the lawyer is sometimes required to challenge the techniques used by and even the professional competence of the person presenting or recommending dispositional alternatives. See generally Part IX, *infra*.

These areas of conflict have often led social workers and lawyers to mutual resentment and distrust. Some probation officers and social workers take the view that attorneys, as a class, "don't understand what's going on and try to get the kid off on a technicality." Erickson, *supra* at 133. Some lawyers, particularly those who regularly deal with the poor, have a tendency to characterize social service staff as naive, powerful and arbitrary figures largely interested in preserving their own entrenched interests. See Platt & Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 *U. Pa. L. Rev.* 1156, 1175 (1968). In either case, indulgence or communication of such ad hominem impressions may well interfere with an attempt to deliver services that are both needed and legitimately within the professional responsibilities of the other group. Lawyers have a role determined in large part by choices made by their clients, which choices they are bound to advocate; social

workers and probation officers are not so tied to a representational capacity but rather use the professional relationship to effect change in the client and/or the client's environment. See Smith & Curran, *A Study of the Lawyer-Social Worker Professional Relationship* 10 (1968). Each should, it is true, understand the demands of the other's profession but conscientiously discharge his or her own responsibility. At the same time, inconsistency in function ought not imply lack of respect between the professions.

Care in this regard is demanded not only by considerations of courtesy and convenience; attorneys must also remember that if a petition is sustained and supervision ordered, their clients will have a continuing and important relationship with social work or probation department personnel. On the one hand, disrespect manifested during the proceeding may seriously affect a client's readiness to work with any probation officer, and particularly one who has been the subject of disparaging remarks by counsel. On the other hand, attorneys should avoid provoking antagonism toward themselves and, derivatively, their clients on the part of court officers with considerable power over clients' lives. H. Freeman & H. Weihofen, *Clinical Law Training* 455 (1972).

Lawyers must also be aware that the same institutional relationships which create conflict in contested cases can result in constructive mutual efforts to seek a satisfactory early or postadjudicative dispositional plan. A frank exchange of information relating to a respondent's circumstances is often desirable from everyone's perspective. And, while lawyers must respect the rules of confidentiality during these discussions, they may properly seek a client's consent to disclosures of confidences and secrets to the extent necessary for useful cooperation. See § 3.3, *infra*. The information gained in this manner may further be useful in counseling clients independent of specific legal proceedings.

Finally, it is important that ongoing relationships between probation officers or social workers and clients or their families not be needlessly disrupted. Except to the extent required for protection of a client's interest in a pending or contemplated legal proceeding or of other statutory and constitutional rights, lawyers should encourage cooperation with social work or probation personnel charged with legal responsibility for supervision of clients or their families.

#### 1.5 Punctuality.

A lawyer should be prompt in all dealings with the court, including attendance, submissions of motions, briefs and other papers, and in dealings with clients and other interested persons. It is unprofes-

sional conduct for counsel intentionally to use procedural devices for which there is no legitimate basis, to misrepresent facts to the court or to accept conflicting responsibilities for the purpose of delaying court proceedings. The lawyer should also emphasize the importance of punctuality in attendance in court to the client and to witnesses to be called, and, to the extent feasible, facilitate their prompt attendance.

*Commentary*

Every lawyer is obliged to be punctual in fulfilling all professional commitments. ABA, *Code of Professional Responsibility* EC 7-38; ABA, *Standards Relating to the Defense Function* § 1.2(a); H. Drinker, *Legal Ethics* 82 (1953). Deliberate or negligent failure to be punctual in court attendance has frequently been held grounds for criminal contempt citation. See Anno., 97 A.L.R.2d 431 (1964); ABA, *Standards Relating to the Defense Function* 179. Similarly, false statements or equivocation in giving the reason for a requested continuance may result in disciplinary action or the contempt sanction. *Id.* at 179-80. It is, further, a logical corollary of the preceding that the attorney should seek to ensure promptness on the part of clients and of other witnesses to be called. *Id.* at 179.

These rules apply to lawyers engaged in juvenile court representation as in any other instance. Delaying tactics employed in the hope that a prosecution witness will lose interest in testifying or to improve a bargaining position are not less reprehensible in this forum, nor is negligence in investigation or preparation more justifiable. Affirmatively, there is particular need for juvenile court counsel to impress the importance of punctuality on the client, family and witnesses, who may not appreciate the need for promptness in court or, perhaps, deliberately delay appearance as an expression of resentment toward the institution or proceedings. H. Freeman & H. Weihofen, *Clinical Law Training* 248, 454 (1972). In other cases, a youthful client may be dependent for transportation on a parent who is hostile to the child's position or to the court in general. Where the lawyer has reason to think this the situation, he or she should seek in so far as possible to facilitate the client's prompt attendance.

In juvenile court matters, as in others, there will be occasions when even the most diligent and careful attorney finds adjournment necessary to adequate representation. In these instances, delay is not unnecessary, and counsel may and sometimes must seek a continuance. See Drinker, *supra* at 83.

**1.6 Public statements.**

(a) The lawyer representing a client before the juvenile court should avoid personal publicity connected with the case, both during trial and thereafter.

*Commentary*

The proper role of counsel, in juvenile matters as in all others, does not involve personal aggrandizement through exploitation of newsworthy cases. Pursuit of media exposure in order to advance personal or professional reputation is not only extrinsic to the principles governing the lawyer-client relationship but may, in some cases, lead counsel to conduct which is not in a client's best interests. See ABA, *Standards Relating to the Defense Function* § 1.3(a) and Commentary. The latter risk is particularly acute in juvenile court representation, since the lawyer's statements during or after trial may be inconsistent in result with local statutes and court rules intended to protect children from the social disadvantage flowing from public familiarity with their identities and behavior. See § 1.6(b), below.

**1.6(b)**

Counsel should comply with statutory and court rules governing dissemination of information concerning juvenile and family court matters and, to the extent consistent with those rules, with the ABA *Standards Relating to Fair Trial and Free Press*.

*Commentary*

Confidentiality concerning proceedings and participants in juvenile court has been traditional to that forum's operation. Geis, "Publicity and Juvenile Court Proceedings," 30 *Rocky Mtn. L. Rev.* 101 (1958); Cashman, "Confidentiality of Juvenile Court Proceedings: A Review," 24 *Juv. Just.* 30 (Aug. 1973). However, a contrary position on the matter of confidential proceedings has been endorsed by the IJA-ABA Joint Commission on Juvenile Justice Standards in the volume on *Adjudication*, where it is stated that a juvenile in an adjudication proceeding has a right to a public trial. IJA-ABA, Juvenile Justice Standards Project, *Adjudication* § 6.1. Cf. ABA, *Standards Relating to Fair Trial and Free Press* § 1.1, pp. 93-94; ABA, *Standards Relating to the Defense Function* § 1.3 (b).

Despite the long acceptance of rules for privacy in juvenile court matters, their significance for the conduct of counsel is often unclear. In many instances, the governing statutes antedate regular

appearance of lawyers in this forum and the need for direction to counsel had not seemed necessary. Most rules seek to protect the child by closing the court or opening it only on condition and by limiting access to records and files. They rarely prohibit or penalize in plain language the making of public statements concerning juvenile court proceedings per se. In consequence, the extent to which such statutes are intended and effective for regulation of counsel's statements is frequently open to doubt.

Whether legislative or court rules govern public comments by counsel is, then, a matter on which attorneys must satisfy themselves by reference to prevailing local law. It is axiomatic that attorneys must conform to those rules in so far as they apply. It is also fair to say that, even where formal rules are uncertain, lawyers in juvenile court practice customarily recognize and abide by the principle of privacy concerning their clients and the proceedings in which they are involved. This is usually an appropriate and desirable product of concern for the welfare of clients and their families. Since authoritative rules usually protect those concerned from exposure at the hands of police, court officers or observers, extrajudicial statements by counsel will create publicity and disadvantage when none would otherwise occur. The duty of lawyers to protect their clients' interests will ordinarily require them to avoid any comment that presents, even remotely, the possibility of avoidable stigmatization and embarrassment.

Where public comment is consistent both with law and the interests of the client, counsel should be guided by the provisions of the *ABA Standards Relating to Fair Trial and Free Press*, which attempt to balance the interests of public information and fairness in the context of the criminal justice system, and by DR 7-107 of the *ABA, Code of Professional Responsibility*.

#### **1.7 Improvement in the juvenile justice system.**

**In each jurisdiction, lawyers practicing before the juvenile court should actively seek improvement in the administration of juvenile justice and the provision of resources for the treatment of persons subject to the jurisdiction of the juvenile court.**

#### *Commentary*

The *ABA Code of Professional Responsibility* (at EC 8-1) observes that lawyers through education and experience are specially qualified "to recognize deficiencies in the legal system and to initiate corrective measures therein." See Vanderbilt, "The Five Functions of the Lawyer: Service to Clients and to the Public," 40 *A.B.A.J.* 31,

31-32 (1954). It is appropriate, therefore, to place on them an obligation to seek, through lawful means, necessary changes in the rules of substantive law and in practices or procedures governing the administration of justice. *Code, supra* at EC 8-2. To this may be added a similar obligation to advocate and attempt to facilitate the provision of adequate resources for the treatment of persons subject to court authority.

These duties are not only appropriate but peculiarly important in the case of lawyers engaged in juvenile court practice. The rules of privacy for proceedings in that court and the relatively low visibility of juvenile correction agencies suggest that attorneys are almost uniquely situated to evaluate existing practice and facilities. There is, unfortunately, ample evidence that improvement in these respects is desperately needed in many parts of the country. Substantial deviation from constitutional and statutory requirements has sometimes been documented. *E.g.*, Langley, "The Juvenile Court: The Making of a Delinquent," 7 *Law & Society Rev.* 273 (1972); W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* (1972); Lefstein, Stapleton & Teitelbaum, "In Search of Juvenile Justice: *Gault* and its Implementation," 3 *Law & Soc. Rev.* 491 (1969); NCCD, *Court Services for Children and Families: A Survey of the Cuyahoga County Juvenile Court* (1968). The staffing and conditions of detention and placement or commitment institutions have also been found highly inadequate in too many instances. See generally *Hearings on S. Res. 32 Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, United States Senate, 92nd Cong., 1st sess. (1971); Office of Children's Services, *Desperate Situation—Disparate Service* (1973); *Lollis v. New York State Department of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970); Rosenheim, "Detention Facilities and Temporary Shelters," in L. Pappenfort, *Child Caring: Social Policy and the Institution* 253 (1973); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974). Where such failures or abuses exist, the attorney should make them known and seek their rectification as vigorously as possible, whether through litigation, legislative activity or other lawful activity.

## PART II. PROVISION AND ORGANIZATION OF LEGAL SERVICES

### 2.1 General principles.

#### (a) Responsibility for provision of legal services.



Provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community. It is, accordingly, the responsibility of courts, defender agencies, legal professional groups, individual practitioners and educational institutions to ensure that competent counsel and adequate supporting services are available for representation of all persons with business before juvenile and family courts.

(i) Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through formal training, association with experienced juvenile counsel or by other means. To this end, law firms should encourage members to represent parties involved in such matters.

(ii) Suitable undergraduate and postgraduate educational curricula concerning legal and nonlegal subjects relevant to representation in juvenile and family courts should regularly be available.

(iii) Careful and candid evaluation of representation in cases involving children should be undertaken by judicial and professional groups, including the organized bar, particularly but not solely where assigned counsel—whether public or private—appears.

#### *Commentary*

It is familiar knowledge that juvenile court clientele is predominantly poor and drawn from minority populations. See, e.g., *Report on Legal Representation of Indigents in the Family Court Within the City of New York 2* (1973) (cited as *New York Report*). Consequently, representation can only be provided if counsel without cost is readily available and such availability is known to the respondent and other interested persons. Regrettably, this has not always been and is not always now the case. There continue to be jurisdictions in which few juveniles receive full representation throughout the proceedings because an adequate pool of capable attorneys does not exist. Defender agencies are often understaffed and lack adequate supporting services. See *New York Report, supra* at 15; Dyson & Dyson, "Family Courts in the United States," 9 *J. Fam. Law* 1, 57-58 (1969); National Legal Aid & Defender Association, *The Other Face of Justice, passim* (1973). Assigned counsel systems may not have sufficient resources, either legal or supporting, to meet the demand, nor is there adequate provision for compensation and reimbursement of participating attorneys. See commentary to § 2.1(b), *infra*.

It must also be recognized that many existing schemes for legal representation are expressly tied to the requirements of *In re Gault* and do not make representation available in cases involving children

in need of supervision, neglect, dependency or termination of parental rights, or for those who may be affected by but are not technically parties to juvenile court proceedings. As the need for legal assistance in these circumstances comes to be accepted, see, *e.g.*, *In re B.*, 20 N.Y.2d 352, 334 N.Y.S.2d 133 (1972) (counsel required for parent in neglect action); N.Y. Fam. Ct. Act § 249 (counsel for children subject to in need of supervision or neglect proceedings), existing legal services will, without careful planning, become yet more strained. For example, there are now approximately 2600 full-time public defenders active in all areas of representation. It has been estimated that 2526 additional full-time attorneys would be required to provide legal services to three-fourths of all juveniles entitled to counsel under *Gault* and that a further 1585 lawyers would be necessary if representation were extended to the same proportion of children involved in in need of supervision and child protective matters. *The Other Face of Justice*, *supra* at 71-74. Having regard, then, to both present and foreseeable demands for assistance and to the significance of that assistance for all involved, it is centrally important that every sector of the legal community accept the responsibility to train, provide and support personnel and agencies engaged in juvenile court representation. Compare ABA, *Standards Relating to Providing Defense Services* 13-15 (App. Dr. 1968).

To make representation available for the juvenile court's clientele, wide and expert participation by the bar will often be necessary. In many jurisdictions, public or private defender agencies do not exist or cannot fully meet the demand for services. The experience in New York City strongly indicates that the private bar must accept significant responsibility for representation even where public agencies exist. *New York Report*, *supra* at 13. Moreover, it has been suggested with respect to criminal matters that broad participation "is important to the health of the administration of criminal justice." ABA, *Standards Relating to the Defense Function* 187 (App. Dr. 1971). Having regard to the confidential nature of juvenile proceedings and to the isolation in which some courts still operate, this argument has if anything special force in the juvenile justice area. It is important that lawyers in general know and understand the operations of the juvenile court; it is equally important that juvenile court personnel appreciate techniques and theories employed in, for example, criminal and custody proceedings. Much the same view informs the position taken in the ABA *Standards Relating to Court Structure* which urges that juvenile courts be divisions of the court of general trial jurisdiction and that judges not be permanently elected or assigned to the juvenile bench.

It is equally clear that representation must be competent as well as available. Unfortunately, few lawyers outside of public defender or legal aid agencies have substantial experience in juvenile court representation. As with criminal representation, a persuasive case can be made for certified specialization in this area. *Cf.* ABA, *Standards Relating to the Defense Function* 187 (App. Dr. 1971); Bazelon, "The Defective Assistance of Counsel," 42 *U. Cin. L. Rev.* 1, 18-19 (1973). General trial experience affords a basic set of skills important to juvenile court representation. Special problems are encountered, however, in interviewing and examining the youthful witnesses upon whom many juvenile court cases turn. H. Freeman & H. Weihofen, *Clinical Law Training* 458-463 (1972); R. Cipes, *Criminal Defense Techniques* §§ 60.06[3] and [4] (1974). The same may be said of the poor and minority clients and witnesses who are disproportionately represented in juvenile court proceedings. Freeman & Weihofen, *supra* at 449-458. In virtually every case involving a dispositional hearing, and in many that do not, social scientific and psychological evidence is before the court. Counsel must, accordingly, be familiar with the preparation, interpretation and significance of these data. The attorney should, as well, know the characteristics and programs associated with various dispositional alternatives open to the court and be in a position to counsel a client with respect to legal and nonlegal matters.

Inevitably and properly, the obligation to train attorneys for juvenile practice and to organize their participation will principally fall to educational institutions and to the bar itself. In both these endeavors there has been progress. Increased recognition by law schools of the importance of juvenile court practice is reflected in the appearance of several casebooks wholly or partially devoted to juvenile justice and, even more significant, by adoption of courses in this area. An informal survey of law school bulletins revealed that almost 60 percent of AALS-accredited institutions offer at least one course, seminar and/or clinical program addressed to juvenile court problems, and it may well be that two-thirds of the schools now make curricular provision for this subject.

This trend should be continued and strengthened by inclusion of nonlegal materials relevant to representation in juvenile court proceedings. For many attorneys who now practice, however, curricular recognition of the importance of juvenile court law comes too late to be of educational benefit to them. And, even for lawyers with either formal educational or practical familiarity with this area, regular access to recent developments and new approaches is important. To meet this need, programs of postgraduate educa-

tion in juvenile justice and juvenile court law must be available, particularly if the potentially inconsistent goals of wide participation and special competence in juvenile matters are seriously and jointly pursued.

As Judge Bazelon observed with respect to criminal practice, "If we are going to demand that criminal lawyers demonstrate a specialist's expertise, we must provide them with some means to achieve it. Since we want to keep the field open to lawyers who are not in full-time criminal practice, criminal law institutes and continuing legal education should be available. . . ." Bazelon, *supra* at 18-19. For a similar view with respect to juvenile court representation, see *New York Report, supra* at 14.

The impetus for such programs must come largely from the bar, which plays an integral part in many, indeed most, continuing legal education programs. Other devices to expand and improve juvenile court representation, such as association with attorneys experienced in that field, should also be explored and facilitated as far as practicable. The *ABA Standards Relating to Providing Defense Services* has recommended association as a method for assuring indigents competent defense in criminal cases. *Id.* at § 2.2 and Commentary at 28-29 (App. Dr. 1968). Such an arrangement has been adopted for adult prosecutions in the District of Columbia and has been approved by the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association in their joint study, *Equal Justice for the Accused* (at 87). Association is also widely used as a training device in large prosecution and defense offices.

The Legal Services and Defender Attorneys Juvenile Justice Standards Consortium and others recommend that the standard expressly provide that legal services offices and state and local governments should be responsible for the provision of legal services in family and juvenile courts.

#### 2.1(b) Compensation for services.

(i) Lawyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time and services performed according to prevailing professional standards. In determining fees for their services, lawyers should take into account the time and labor actually required, the skill required to perform the legal service properly, the likelihood that acceptance of the case will preclude other employment for the lawyer, the fee customarily charged in the locality for similar legal services, the possible consequences of the proceedings, and the experience, reputation and ability of the lawyer or lawyers

performing the services. In setting fees lawyers should also consider the performance of services incident to full representation in cases involving juveniles, including counseling and activities related to locating or evaluating appropriate community services for a client or a client's family.

(ii) Lawyers should also take into account in determining fees the capacity of a client to pay the fee. The resources of parents who agree to pay for representation of their children in juvenile court proceedings may be considered if there is no adversity of interest as defined in Standard 3.2, *infra*, and if the parents understand that a lawyer's entire loyalty is to the child and that the parents have no control over the case. Where adversity of interests or desires between parent and child becomes apparent during the course of representation, a lawyer should be ready to reconsider the fee taking into account the child's resources alone.

(iii) As in all other cases of representation, it is unprofessional conduct for a lawyer to overreach the client or the client's parents in setting a fee, to imply that compensation is for anything other than professional services rendered by the lawyer or by others for him or her, to divide the fee with a layman, or to undertake representation in cases where no financial award may result on the understanding that payment of the fee is contingent in any way on the outcome of the case.

(iv) Lawyers employed in a legal aid or public defender office should be compensated on a basis equivalent to that paid other government attorneys of similar qualification, experience and responsibility.

#### *Commentary*

**Retained Counsel and In General.** This standard is in accordance with traditionally accepted criteria for compensation of legal counsel. See ABA, *Standards Relating to the Defense Function* § 3.3(a) and Commentary thereto; ABA, *Code of Professional Responsibility* DR 2-106(B); H. Drinker, *Legal Ethics* 173-74 (1953). The measure of compensation may properly reflect time and expense incurred in counseling or assisting the arrangement of nonlegal services for clients and their families where such activity is warranted. Rendition of such services is viewed throughout these standards as an integral and wholly appropriate aspect of the attorney's role.

It is also customary and appropriate for lawyers to consider the client's resources in setting or modifying their fees. See ABA, *Code of Professional Responsibility* EC 2-16. In juvenile court matters,

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counsel may take into account the willingness and ability of a child's parents to pay for legal services. Indeed, counsel must ordinarily do so if any fee is to be charged. At the same time, compensation from a source other than the client cannot be accepted or considered in setting a fee if the consequence may be divided loyalty or dilution of professional independence. ABA, *Code of Professional Responsibility* EC 5-22, 5-23; DR 5-107(B). The attorney should, therefore, early make clear to the parents or others who offer to pay for a child's representation that counsel's loyalty runs to the client and not to the source of payment, and that those who pay, if other than the client, have no control over the case. It is, moreover, incumbent on the attorney to satisfy himself or herself before accepting payment that the interests of parent and child are not then or likely to become adverse with respect to the proceedings. If, for example, it appears that what began as a delinquency petition may ultimately be treated as a neglect matter, and particularly if counsel may be in the position of urging that result, full disclosure of that possibility must be made to the parent. When opposition to that course is apparent, the lawyer may be required to disregard the parents' resources even if continued willingness to pay is expressed. *Cf.* Los Angeles City Bar Association, *Ethics Op.* 1964-1, p. 468. Similarly, if the parents insist on controlling representation of their child during the course of the matter, it may be necessary for counsel to terminate his or her relationship with them and consequently to adjust all or part of the fee in light of the client's individual resources, if any.

**Appointed Counsel.** Where counsel is assigned to represent an indigent party in juvenile court proceedings, adequate compensation is of the first importance. The Allen Committee was surely correct in observing, with respect to the criminal justice system, that "primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate. . . . A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance. . . ." *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* 41-42 (1963).

Most rules for compensation, however, continue to provide only token or partial payment for the services of assigned counsel, relying on the bar's sense of professional responsibility to ensure competent representation. In juvenile cases, the situation is particularly aggravated. While complete denial of compensation and/or reimbursement is infrequent for lawyers appointed in criminal cases, see 1 S. Speiser, *Attorney's Fees* 106-07 (1973), the availability of fees and

expenses provided by statute for criminal defense to counsel assigned in juvenile court matters is not clear. See *In re State in the Interest of Steenback*, 34 N.J. 89, 167 A.2d 397 (1961). Moreover, the range of compensation allowable under current statutes and judicial rules is not generally adequate to justify systematic expectations of thorough and competent representation. When hourly maxima are used, limits of \$10 per hour for office time and \$15 per hour court time are not unknown. Md. Code Ann., Art. 26, § 12A; Mass. R. Crim. P., Rule 10(5); S. Car. Code § 17-284 (Supp. 1973). Other states employ equally modest maximum allowances for the entire case. *E.g.*, W. Va. Code § 49-5-13 (1974 Supp.) (\$50 maximum); Va. Code § 16.1-173(d) (\$75 maximum); N. H. Rev. Stat. Ann. § 604-A:5 (\$100 maximum).

That some of these limits are clearly inadequate to compensate careful treatment of even the most routine case hardly requires stating. A further and perhaps greater source of concern lies, however, in the potential impact of these limits on the quality of representation generally. It can reasonably be feared that, particularly at the stated levels, reliance on this device for compensation may well lead counsel to treat each case as "routine." It may be thought unrealistic to expect attorneys to invest considerable time and effort in either pretrial investigation, counseling or development of an alternate dispositional scheme if they cannot claim a fee which is adequate even for the court time involved. In addition, a few states exacerbate an already unsatisfactory plan by setting the level of compensation for counsel in juvenile court cases significantly below that available to attorneys appearing in criminal cases, even where lengthy incarceration may not be in issue. *E.g.*, N. H. Rev. Stat. Ann. § 604-A:5 (maxima of \$500 in felony cases, \$200 for misdemeanors and \$100 for delinquency proceedings). The tendency of such provisions both to denigrate the importance of juvenile court representation and to encourage purely formal appearance of counsel is obvious.

The majority of states provide for payment of "reasonable compensation" to appointed counsel. *E.g.*, Idaho Code Ann. § 19-860(B) (Supp. 1974); Mich. Comp. L. § 712A.17; N.M.S.A. § 13-14-38(2); Minn. Stat. Ann. § 260.251(2)(e); Neb. Rev. Stat. § 43-205.07; Pa. Stat. Ann. § 9960.7; Vt. Stat. Ann. tit. 13, § 5205; Wis. Stat. Ann. § 48.25(6); Tenn. Code Ann. § 37-249. No recent or systematic information is available with regard to the manner in which such provisions have been implemented in practice. Thus, while a preference for this formulation over those described above may be expressed, no judgment on the actual adequacy of "reasonable compensation" statutes can confidently be offered.

Most of these formulations violate the principle of full compensa-

tion articulated in subsection (i) of the standard, which principle is believed necessary to assure wide, expert and complete representation in juvenile court matters. Both institutionally and for the sake of clarity, compensation for assigned counsel should be set by reference to locally prevailing fees for participation in juvenile court matters or in cases of similar complexity. *E.g.*, Federal Criminal Justice Act, 18 U.S.C. § 3006(A)(d)(1).

**Public Defenders.** It is impossible to assure quality and continuity in a public defender office if counsel are not fairly compensated for their services. L. Silverstein, *Defense of the Poor* 43-45 (1965). Such compensation should be equivalent to that paid other government attorneys of similar qualification, experience and responsibility. See, *e.g.*, D.C. Code Ency. § 2-2222; Ala. Code § 260 (21) (a). To the same effect are ABA *Standards Relating to Providing Defense Services* § 3.1 and Commentary thereto; NLADA Standards No. 5 (1970); Model Defense of Needy Persons Act, § 10. Correlatively, within any public defender organization, compensation for staff attorneys dealing with juvenile court matters should be consistent with that paid lawyers of similar standing assigned to other departments of the agency.

**Specific Ethical Limitations Regarding Compensation.** The traditional ethical bars against overreaching of clients, fee splitting, contingency arrangements and suggestions that compensation is intended for other than professional services apply with equal force to juvenile court representation. See ABA, *Standards Relating to the Defense Function* § 3.3(b)-(e); ABA, *Code of Professional Responsibility* DR 2-106(A), DR 3-102. The general injunction against sharing fees with laymen should not, however, be interpreted to prohibit employment of social workers, counselors or investigators, a practice which is affirmatively encouraged by Section 2.1(c) of these standards. A layman may properly be employed by a lawyer on any agreed basis as long as the former's services do not constitute the practice of law. Drinker, *supra* at 179-180.

**2.1(c) Supporting services.**

Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile and family court proceedings.



- (i) Where lawyers are assigned, they should have regular access to all reasonably necessary supporting services.
- (ii) Where a defender system is involved, adequate supporting services should be available within the organization itself.

*Commentary*

Traditionally, criminal defendants without substantial means have had little opportunity to meet the potentially limitless investigative facilities available to the prosecution. See National Defender Project, *Report to the National Defender Project* 36 (1969). Without access to resources for investigation and preparation, adequate representation cannot be assured, however competent counsel may be. See *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting), *rev'd* 352 U.S. 565 (1957); *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* 46 (1963). The need for supporting services goes beyond discovery for purposes of trial. Access to independent psychiatric and psychological services may be important for determining competence to stand trial or responsibility for the acts alleged; access to these and social services may also be important for preparation of recommendations with respect to sentencing after conviction. See National Advisory Commission on Criminal Justice Standards and Goals, *Courts* 280 (1973). The potential unfairness worked by lack of resources and supporting services available to counsel in preparing the respondent's case has led to a number of proposals for remedying that imbalance. Notably, the ABA, *Standards Relating to Providing Defense Services* provides:

1.5 Supporting Services.

The [indigent defender] plan should provide for investigatory, expert and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process, including determinations on pretrial release, competency to stand trial and disposition following conviction.

See also Model Defense of Needy Persons Act § 2(a)(2).

Provision of social and psychological services has always been central to the entire juvenile justice system. One commission studying the system has suggested that "both by design and concept, the quality of services and success of the operation of the Family Court

is closely related to and dependent upon the quality of auxiliary and supportive services available to it." *Report on Legal Representation of Indigents in the Family Court Within the City of New York* 3 (1973). Correlatively, the quality and success of representation in the family court is closely related to and dependent on the quality of auxiliary and supportive services, particularly social services, available to counsel. The importance of access to social services for preparation of dispositional plans and recommendations, and for meeting those plans and recommendations prepared by court personnel, is clear. *Cf.* Institute for Criminal Law and Procedure, *Rehabilitative Planning Services for the Criminal Defense: An Evaluation of the Offender Rehabilitation Project of the Legal Aid Agency for the District of Columbia* (1969) (hereinafter cited as *Rehabilitative Planning Services*). In delinquency and in need of supervision matters, much the same information will directly bear on whether an adjudication should be made where jurisdiction is defined in terms both of acts and of the need for treatment. *E.g.*, Ill. Rev. Stat. ch. 37, § 704(8) (1971); N.Y. Fam. Ct. Act §§ 731, 743. See *In re R.*, 323 N.Y.S.2d 909 (1971).

Social services are also necessary for many aspects of counseling. These standards expressly consider counseling an appropriate and important aspect of counsel's role in representing juvenile clients and their parents. See § 5.3, *infra*. Arranging for vocational training and job placement, financial assistance, housing, family service counseling, psychological and psychiatric counseling, casework supervision and followup, inpatient and outpatient treatment of various kinds, and placement for drug addicts, alcoholics and runaways are among the services which may arise naturally from dealing with a youthful client. *Cf.*, *Rehabilitative Planning Services*, *supra* at 28. To the extent that defender organizations can facilitate delivery of such assistance, they may contribute significantly to rehabilitation of those in need, quite apart from the posture taken with respect to formal proceedings.

#### 2.1(d) Independence.

Any plan for providing counsel to private parties in juvenile court proceedings must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship.

#### *Commentary*

Attorneys, however retained or secured, must enjoy professional independence and clients, whether rich or poor, are entitled to rely on their relationship with counsel in all matters covered by that

relationship. There is no justification for allowing considerations of politics generally, or of judicial preference, to intrude on the lawyer's independence or to compromise the integrity of the lawyer-client relationship. ABA, *Standards Relating to Providing Defense Services* § 1.4 and Commentary (App. Dr. 1968); National Legal Aid and Defender Association, *Standards for Defender System* § 4 (1965), adopted by House of Delegates, American Bar Association, February 1966.

There have been, for example, significant instances of political intrusion into provision of legal services—particularly with respect to OEO programs. See, e.g., Bennett & Reynoso, "California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice," 1 *Chicano L. Rev.* 1 (1972); Note, "The Legal Services Corporation: Curtailing Political Interference," 81 *Yale L.J.* 231 (1971). Although juvenile court legal service plans have not regularly been subject to such executive and legislative pressures, independence from judicial influence cannot be assumed. The willingness of some judges to direct lawyers' performance and thereby compromise their independence has been established beyond serious doubt. See E. Lemert, *Social Action and Legal Change: Revolution within the Juvenile Court* 198-200 (1970); McKesson, "Right to Counsel in Juvenile Court Proceedings," 45 *Minn. L. Rev.* 843, 846-47 (1961). Indeed, there is reason to believe that, even after *Gault*, courts and judges may systematically constrain the effective capacity of counsel and client to determine the latter's posture in the proceedings. W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* ch. 5 (1972).

In order to insulate public defender staff from such pressures, the ABA, *Standards Relating to Providing Defense Services* § 1.4 and Commentary has suggested that ultimate authority and responsibility for the defender plan be placed in an independent board of trustees. It is, of course, true that not every experience with governing boards has been successful, and that there are instances in which the governing boards are so unfamiliar with defender problems or so affected by extrinsic political concerns that they compromise rather than promote professional independence in the agency. See National Advisory Commission on Criminal Justice Standards and Goals, *Courts* 272 (1973). On the other hand, the office is a public one and the political and financial pressures on it are real. Accordingly, the effort should not be to eliminate boards of this kind, but carefully to select membership and define the scope of authority of the board.

To the extent that juvenile court representation is administered by agencies or plans providing defense in criminal cases, no further comment is necessary. The board should provide the same independence

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for lawyers engaged in juvenile court representation as exists for criminal matters. Where juvenile court representation is separately administered, the creation of an independent board of trustees for that plan is urged. And, as with criminal defense plans, the board and its members should principally be concerned with development of general policy and not with the conduct of any particular case.

2.2 Organization of services.

(a) In general.

Counsel should be provided in a systematic manner and in accordance with a widely publicized plan. Where possible, a coordinated plan for representation which combines defender and assigned counsel systems should be adopted.

*Commentary*

The necessity for a rational and systematic plan for providing counsel is obvious. ABA, *Standards Relating to Providing Defense Services* § 1.2 and Commentary (App. Dr. 1968); L. Silverstein, *Defense of the Poor* 16-17, 21-25 (1965). Resort to *ad hoc* arrangements is largely inconsistent with implementing programs to increase the numbers and specific competence of lawyers engaged in juvenile court representation. See § 2.1 of these standards and commentary thereto.

Where circumstances allow, a combined defender-appointed counsel system is preferred to reliance on a single device for providing legal services. A defender agency alone will, inevitably, encounter conflicts of interest. Indeed, under the standards here set forth, conflict will often occur whenever multiple parties are involved in related proceedings. See § 3.2, *infra*. There must, accordingly, exist some systematic method of securing representation to those indigents ineligible for defender services. Similar difficulties arise at the appellate stage; review of the transcript by independent counsel is often necessary to identification of grounds for appeal, particularly where incompetence of trial counsel may be involved. Sole reliance on a defender office is also inconsistent with the goal of wide bar participation in juvenile court matters. See § 2.1 *supra* and commentary thereto. On the other hand, defender agencies bring special expertise to juvenile proceedings and may conveniently provide or administer the supporting services essential to full and adequate representation. See Institute for Criminal Law and Procedure, *Rehabilitative Planning Services for Criminal Defense: An Evaluation of the Offender Rehabilitation Project of the Legal Aid Agency*

for the District of Columbia (1969). The preference for a combined system stated here is consistent with the position taken by the National Advisory Commission on Criminal Justice Standards and Goals, *Courts* 263-64 (1973).

It should also be noted that the standard speaks of a "coordinated" plan combining public and private defender services. The importance of coordination for efficient use of manpower and for supervision of the quality of representation for indigents should be apparent. This responsibility might be placed with an independent agency or with the defender agency itself. The District of Columbia Public Defender Service Act, for example, requires the service to "establish and coordinate the operation of an effective and adequate system for appointment of private attorneys," although the authority to make appointments resides in the courts. D. C. Code Ency., § 20-2222(b). *Report on Legal Representation of Indigents in the Family Court Within the City of New York* (1973) takes somewhat the same direction, without specific location of supervisory function, in suggesting that "[t]he various New York City bar associations should devise and submit to the Appellate Division a single city-wide plan for recruitment, training and evaluation of the extended panels for court approval." *Id.* at 13.

The Legal Services and Defender Attorneys Juvenile Justice Standards Consortium proposed the following plan:

Where possible, representation should be furnished through a defender and/or legal services system with appointed counsel available where conflicts of interest exist, or the defender or legal services office is unable or unwilling to handle the case. Preference of a juvenile for a particular attorney, or for an attorney who speaks the same language as the juvenile, will be honored whenever such counsel is available and willing to serve.

## 2.2(b) Defender systems.

### (i) Application of general defender standards.

A defender system responsible for representation in some or all juvenile court proceedings generally should apply to staff and offices engaged in juvenile court matters its usual standards for selection, supervision, assignment and tenure of lawyers, restrictions on private practice, provision of facilities and other organizational procedures.

### (ii) Facilities.

If local circumstances require, the defender system should maintain a separate office for juvenile court legal and supporting staff, located in a place convenient to the courts and equipped

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with adequate library, interviewing and other facilities. A supervising attorney experienced in juvenile court representation should be assigned to and responsible for the operation of that office.

(iii) Specialization.

While rotation of defender staff from one duty to another is an appropriate training device, there should be opportunity for staff to specialize in juvenile court representation to the extent local circumstances permit.

(iv) Caseload.

It is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge.

*Commentary*

**Application of General Defender Standards.** The term “defender system” here applies to plans for providing counsel which rely on salaried lawyers devoting all or a substantial part of their time to the specialized practice of representing indigent persons. In most respects, the ABA *Standards Relating to Providing Defense Services*, and particularly Part III, should govern the operation of offices under that plan. It should also be assured that, where a public defender or other agency is responsible for juvenile court representation, the standards generally applied to selection, assignment, supervision and tenure for staff and to other organizational matters apply to personnel engaged in juvenile court representation. Responsibilities in this regard usually should not be delegated to nonstaff counsel on a contract basis, nor should an office that generally engages staff on a full-time basis employ part-time counsel specifically for juvenile court cases. Whether consciously intended or not, such strategies tend to denigrate the significance of juvenile court representation and may substantially detract from the plan’s capacity to provide thorough and competent assistance in juvenile court matters.

**Facilities.** In jurisdictions where the juvenile court is located away from other courts, the defender system should provide facilities for counsel and supporting staff in a place convenient to the court. Geographical inconvenience will not only make practice in juvenile court matters appear unattractive, but will diminish the caseload that counsel can adequately manage. See commentary to § 2.2(b) (iv), *infra*. Where a separate office is maintained for lawyers

engaged in juvenile court practice, it is ordinarily desirable that an experienced staff member have responsibility for day-to-day assignments and general supervision.

There should be adequate space in the office for private consultation with clients, for secretarial and supporting staff, and for a library of basic materials. In addition, equipment necessary for investigation and preservation of evidence should be available. See National Advisory Commission on Criminal Justice Standards and Goals, *Courts, supra* at 280-81.

**Specialization.** In some large defender agencies, as in large law firms, the opportunity to specialize may be available. Typically, this opportunity comes as a matter of course; lawyers undergo a training period involving rotation from one court or duty to another, culminating in regular felony or appellate litigation. Where specialization can be afforded, that opportunity should be available to personnel who wish to engage in juvenile representation as well as to those who are principally interested in criminal court or appellate representation. Provision of such an option to counsel may not only serve to stress recognition of the importance of representation in juvenile court matters, but may also further the goal of career service set forth in the *ABA Standards Relating to Providing Defense Services*.

**Caseload.** No plan for providing representation to indigents can be satisfactory when staff attorneys are assigned more cases than they can manage thoroughly and carefully. The desideratum, for juvenile or for criminal or civil court representation, must be to fix caseloads at levels which will not compel lawyers to forego the extensive fact investigation required in both contested and uncontested cases, or to be less than scrupulously careful in preparation for trial, or to forego legal research necessary to develop a theory of representation. Public Defender Service for the District of Columbia, *Third Annual Report* 22 (1973). Unfortunately legal aid and public defender organizations have sometimes experienced difficulty or been unable to so control their caseloads. See *Report on Legal Representation of Indigents in the Family Court Within the City of New York* 15, 26, 41 (1973); Bazelon, "The Defective Assistance of Counsel," 24 *U. Cin. L. Rev.* 1 (1973).

There is no certain way to arrive at caseloads for defender agencies, and approaches have varied substantially. With respect to felony defenses, a yearly maximum of 150 cases per lawyer seems generally acceptable. *E.g.*, *Working Papers from the National Conference on Criminal Justice: The Courts* § 13.12 (1973); National Advisory

Commission, *Courts, supra*; NLADA, *The Other Face of Justice* 73 (1973). Recommended misdemeanor limits, on the other hand, range from 295 to 1000 cases per year. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 56 (1967); *The Other Face of Justice, supra*. For juvenile court representation, a maximum caseload near that for felonies has been proposed. *The Other Face of Justice, supra*. Reasonable limits greatly depend, however, on a number of variables and on local conditions. Thus, standards for assignment cannot be produced by any single mathematical formula and the limits stated above cannot be more than guides to practice. Several factors relevant to the setting of caseloads can, however, be identified:

**Rate of Turnover.** The faster the rate at which cases are closed, the lower should be counsel's caseload. If all of the work preceding a trial, plea or dismissal must be accomplished in a short period, trial counsel can handle fewer cases at any given time. Typically, juvenile court cases involve high turnover and do not involve months of preparation. It is by no means unusual for a matter to have been fully heard and disposed of within a month or six weeks.

**Percentage of Cases Tried.** Evidently, the higher the percentage of cases reaching trial, the lower the lawyer's caseload must be. It has generally been believed that a small minority of juvenile delinquency and in need of supervision matters are contested. R. Emerson, *Judging Delinquents: Context and Process in Juvenile Court* 20 (1969). On the other hand, a recent empirical study indicates wide variation in the incidence of contested cases. In one of two courts studied, counsel entered denials (or did not enter a plea, which had the same effect as a denial) in 36 percent of the matters in which they appeared; in the other, a denial or no plea was entered in almost 70 per cent of the cases. W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 116, table V. 3 (1972). It is, of course, dangerous simply to use existing data concerning percentage of cases contested as a guide; the risk of self-fulfilling prophecy is obvious. The "adversariness" of lawyers, partially reflected in the incidence of guilty pleas, may in turn reflect the circumstances of their practices and of the courts before which they appear. If lawyers do not have adequate time to investigate and prepare cases, there is reason to expect pressure on clients to admit guilt and, therefore, a higher incidence of guilty pleas. *Id.* at 118-128. One cannot, therefore, rely on the rate of guilty pleas in any given jurisdiction at any one



time unless there is also justification for concluding that the existing caseload has not, in effect, produced that rate.

It should also be appreciated that, in many instances, lawyers have a more active and time-consuming role in juvenile court dispositional hearings than their criminal court counterparts. While plea-bargaining is not unknown or impossible in juvenile court matters, *id.* at 134-138, it is not so uniformly found as in adult criminal cases. See *id.* at 134; Emerson, *supra* at 22. Accordingly, juvenile dispositional results are less frequently determined in advance, leaving counsel with substantial responsibility even in many "uncontested" cases.

**Extent of Support Services Available to Staff Attorneys.** To the extent that lawyers themselves undertake investigative functions, prepare alternate dispositional plans and arrange for community services for their clients, caseloads must reflect these crucial and time-consuming responsibilities. Their significance is emphasized repeatedly in these standards, *e.g.*, §§ 2.1(c), 4.3, 5.4, 6.4, and should be considered as important in determining caseload as the requirements of trial duties.

**Court Proceedings.** When lawyers are required to spend time in court awaiting action on their cases, their ability to provide representation is diminished. Delays of several hours are, regrettably, common in juvenile courts as they are in criminal courts, even for initial hearings or stipulated continuances that usually take only a short time to complete. See Public Defender Service for the District of Columbia, *supra* at 23.

**Complex and Special Litigation.** Complex and special litigation, such as class actions, attempts to enforce a client's right to treatment, mandamus proceedings and, in some cases, appeals may place heavy demands on counsel's time. These activities are in many instances necessary to thorough and adequate representation of a client. See §§ 10.4, 10.7, *infra*. In all but a few large offices, these responsibilities are not placed with a special section of the defender organization. Accordingly, assignments should be determined with a realistic eye to the complexity of pending or foreseeable litigation and to the necessity, where it exists, of providing representation on appeal.

**Experience of Counsel.** The more counsel is experienced, and particularly in juvenile court matters, the more can be expected in the way of caseload management. On the other hand, when juvenile

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court representation is used, as is often the case, as an introduction to representation, assignments should reflect the lawyer's inexperience generally and with regard to juvenile court representation.

2.2(c) Assigned counsel systems.

(i) An assigned counsel plan should have available to it an adequate pool of competent attorneys experienced in juvenile court matters and an adequate plan for all necessary legal and supporting services.

(ii) Appointments through an assigned counsel system should be made, as nearly as possible, according to some rational and systematic sequence. Where the nature of the action or other circumstances require, a lawyer may be selected because of his or her special qualifications to serve in the case, without regard to the established sequence.

*Commentary*

It has long been obvious that, without adequate professional and financial resources, an assigned counsel system is fundamentally weakened. There is substantial reason to fear that preparation and interest on the assigned lawyers' part will generally diminish and that inexperienced practitioners will be overrepresented among counsel actually accepting appointments on behalf of indigent clients. See Comment, "The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression," 60 *Ky. L. J.* 710 (1972).

Systematic and gross inadequacy in representation may also be expected where there exists either an inadequate pool of competent and experienced counsel for juvenile court matters, or where, for a variety of reasons including inadequate compensation, that pool cannot realistically be drawn upon. Silverstein observed, with respect to assigned counsel for criminal cases, that lawyers under the plan should be as competent as reasonably able retained counsel:

This means a lawyer with at least moderate experience in criminal court who is known and respected by judge and prosecutor. The young lawyer recently admitted to the bar, the capable real estate or corporation attorney who is unfamiliar with criminal practice, the marginal lawyer of limited ability who hangs around the courtroom hoping for some small piece of business—none of these is the proper choice.

L. Silverstein, *Defense of the Poor* 17 (1965). Unfortunately, in some jurisdictions no other choice is regularly available, and indi-

gents do not generally receive the representation to which they are entitled.

The importance of a rational and systematic plan for providing legal services to indigents has already been noted in section 2.2(a), *supra*. With respect to assigned counsel systems, the dangers inherent in *ad hoc* arrangements are particularly grave. Nonsystematic methods of appointment invite covert and overt interference with counsel's independence and, thereby, with the quality of representation. As one study of California juvenile courts observed:

Judges have some coercive power [over counsel's conduct], especially where attorneys are assigned by the court from a local panel. Here, the judge's actions can speak louder than words. That court assignments are sometimes made with an eye to controlling the conduct of attorneys in hearings was confided in these words: "[Y]ou have to be careful on your appointment of an attorney because he may be energetic; he may become adversary here and you will have problems."

E. Lemert, *Social Action and Legal Change: Revolution within the Juvenile Court* 199 (1970). See also commentary to § 2.1(d), *supra*. Such efforts to affect the exercise of independent professional judgment by counsel can seriously affect administration of juvenile justice unless assignments are removed from uncontrolled judicial discretion and made according to a known and rational sequence.

The requirement of publicity is intimately related to assurance that both potential clients and the bar understand the plan for provision of legal services. ABA, *Standards Relating to Providing Defense Services* 15-16.

Although adequate financing and administration are required to implement these standards, inadequacy in these respects has often been documented. Without question, failure to provide sufficient funds, staff and supporting services will inevitably diminish the quality of representation. The responsibility of the legal profession described in section 1.1, *supra*, extends to seeking to ensure that assigned counsel are able to provide full and adequate representation for indigents and that deficiencies of the sort described above are eliminated as far as possible.

### 2.3 Types of proceedings.

#### (a) Delinquency and in need of supervision proceedings.

(i) Counsel should be provided for any juvenile subject to delinquency or in need of supervision proceedings.

(ii) Legal representation should also be provided the juvenile

in all proceedings arising from or related to a delinquency or in need of supervision action, including mental competency, transfer, postdisposition, probation revocation, and classification, institutional transfer, disciplinary or other administrative proceedings related to the treatment process which may substantially affect the juvenile's custody, status or course of treatment. The nature of the forum and the formal classification of the proceeding is irrelevant for this purpose.

*Commentary*

The need for legal representation in delinquency proceedings is, after *Gault*, largely beyond question. Efforts have occasionally been made, however, to classify delinquency matters according to the probability of commitment to an institution; right to counsel (and other rights required by *Gault*) sometimes has been reserved for those cases in which commitment is probable. The New Jersey split calendar system is perhaps the most notable example of such a device. See *Rules Governing the Courts of the State of New Jersey*, Rule 9.1 (1973). Informal techniques leading to the same result have also been observed. Lefstein, Stapleton & Teitelbaum, "In Search of Juvenile Justice: *Gault* and its Implementation," 3 *Law & Society Review* 491, 531 (1969). The experience with these devices has not been widely disseminated; there is grave reason to doubt, however, whether they can be considered satisfactory either in point of practice or as a matter of law. On the former, see Baumgart, "Split Calendar Sifts Out Dangerous Delinquents," 4 *Trial* 13 (April-May 1968); Chused, "The Juvenile Court Process: A Study of Three New Jersey Counties," 26 *Rutgers L. Rev.* 488 (1973). Continued reliance on such efforts cannot be approved.

Although *Gault* limited itself to provision of counsel for those charged with delinquency, 387 U.S. 1, 13 (1967), legislatures have increasingly accorded the same right to children alleged to be in need of supervision.\* Since adjudication as a child in need of supervision ordinarily entails the possibility of removal from the home or other substantial restrictions on the respondent's liberty, legal advice

\**E.g.*, Alaska Rules of Juvenile Procedure, Rule 15; Calif. Welf. & Inst. Code § 634; D. C. Code Ency., Court Rules, Rule 44(a); Ga. Code Ann. § 24A-2001(a); Idaho Code §§ 16-1809; Ill. Rev. Stat. ch. 37, § 701-20(1); N.M.S.A. § 13-14-25; N. Y. Fam. Ct. Act. § 741; N. C. Gen. Stat. § 7A-285; N.D.C.C. § 27-20-26; Ohio Rev. Stat. Ann., Rules of Juvenile Procedure, Rule 4; Okla. Stat. Ann. tit. 10, § 1109; Pa. Stat. Ann. tit. 11, § 50-319; S. D. Comp. L. § 26-8-22.2.

should be available as in delinquency matters. And where the parent is formally or in fact the complainant, representation by an attorney will afford the only effective source of assistance for the respondent. See *In re Sippy* 97 A.2d 455 (D.C. Mun. Ct. App. 1953); Lefstein, Stapleton & Teitelbaum, *supra* at 547.

This standard also takes the position that legal representation should be provided in all preadjudicative, postdispositional and collateral proceedings that arise from delinquency or in need of supervision actions, if those proceedings may affect the child's custody, status or course of treatment. A number of occasions for such assistance may arise. The gravity of a proceeding to transfer a child for prosecution as an adult, and the importance of counsel at that stage, was specially stressed by the Supreme Court in *Kent v. United States*, 383 U.S. 541 (1966). Upon adjudication and institutional commitment, the receiving agency commonly has authority to release the child, immediately or after a period of treatment, to transfer him to another juvenile institution, or, in some states, to send him to an adult penal institution. See generally *U.S. Children's Bureau, Delinquent Children in Penal Institutions* (1964); Comment, "The Administrative Transfer of Juveniles from Juvenile to Adult Penal Institutions," 16 *St. Louis U.L.J.* 479 (1972). Originally viewed as purely ministerial matters, there is increasingly authority that such actions, when they substantially affect the nature or duration of treatment, must rest on adequate grounds demonstrated in a hearing of some satisfactory kind. See *Specht v. Patterson*, 386 U.S. 605 (1967); *Boone v. Danforth*, 463 S.W.2d 825 (Mo. 1971); *In re Rich*, 125 Vt. 373, 216 A.2d 266 (1966). The desirability of representation during classification and transfer hearings has found express recognition by several courts: *E.g.*, *People ex. rel. F. v. Hill*, 36 A.D.2d 42, 319 N.Y.S.2d 961 (1971), *aff'd*, 29 N.Y.2d 17, 323 N.Y.S.2d 426 (extension of commitment); *Shone v. Maine*, 406 F.2d 844 (1st Cir. 1969) (institutional transfer).

Moreover, the appropriateness of treatment provided under an original commitment order may be subject to question. A number of juvenile codes include some notion of a "right to treatment," usually in very general terms. *E.g.*, D.C. Code Ency. § 2316(3) ("When the child is removed from his own family, the court shall secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given him by his parents"). Nonstatutory bases for reviewing the treatment provided have also been asserted. Conditions of confinement or treatment in juvenile and civil commitment cases have been held violative of the due process clause, *White v. Reid*, 125 F. Supp. 647 (D.D.C. 1954);

*Nason v. Superintendent of Bridgewater State Hospital*, 233 N.E.2d 908, 913 (Mass. 1968); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), and of the eighth amendment prohibition against cruel and unusual punishment. *E.g.*, *Lollis v. New York State Department of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974). Even adult inmates, it has been observed, are often unaware that a course of treatment may be subject to administrative or judicial challenge or, a fortiori, of the grounds upon which complaint can be made and the procedures for doing so. See ABA, *Standards Relating to the Defense Function* §§ 8.2, 8.5 and Commentaries; ABA, *Standards Relating to Postconviction Remedies* § 6.6 and Commentary (App. Dr. 1968). Those standards recommend institutional provision of access to the services of an attorney, and the same requirement seems appropriate in the case of children who are, if anything, less sophisticated and, equally important, long imbued with the necessity for unquestioning acceptance of adult decisions regarding their future.

A waivable right to counsel at disciplinary hearings is provided in *Corrections Administration* Standard 8.9 C., in which the juvenile may select a representative from among certain designated persons, including legal counsel. Therefore, the juvenile has an unwaivable right to counsel at all judicial hearings, but a waivable right to counsel at postadjudication administrative hearings.

Even when the client has been released to the community on probation or after a period of institutionalization, revocation of his or her conditional liberty is possible where it is established that the juvenile has in fact violated a condition of probation or parole and that such revocation is necessary for the welfare of the child or of the community. In cases involving adults, the subject of such proceedings is entitled to notice and a hearing—although not necessarily judicial in character—prior to revocation of probation or recommitment to prison. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). Some state courts have expressly held these rules applicable in the case of children. *E.g.*, *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 271 N.E.2d 908 (1971); *State ex rel. Bernal v. Hershman*, 196 N.W.2d 721 (Wis. 1972). Legal assistance is valuable and important here as in other postconviction proceedings. The Supreme Court has recognized that, in certain circumstances, appointment of counsel is constitutionally required.

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the proba-

tioner or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present.

*Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). The *ABA Standards Relating to Probation*, § 5.4, goes even further in providing that "The court should not revoke probation without an open court proceeding attended by the following incidents: . . . (ii) representation by retained or appointed counsel. . . ." See also *People v. Pier*, 51 Ill.2d 96, 281 N.E.2d 289 (1972). The same circumstances argue for making counsel routinely available to juveniles faced with termination of conditional liberty.

The principle that neither the nature of the forum nor the formal classification of the proceedings justifies denial of access to counsel extends to treatment by a private or "voluntary" agency in which a child has been placed by court order. Increasingly, residential and nonresidential dispositions are effected by purchase or donation of services from a private source rather than through state-operated facilities. Such an arrangement, however desirable generally, does not legitimate curtailment of legal advice in decisions substantially affecting the child's life.

### 2.3(b) Child protective, custody and adoption proceedings.

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

#### *Commentary*

Although "neglect" and "dependency" cases have traditionally been and still are classified as "civil" in character, the rights involved in and potential consequences of such proceedings justify extension

of counsel to the respondent—parent. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Supreme Court held that a hearing was required before an unwed father's rights to custody could be terminated by dependency proceedings. With respect to the importance of the parent-child relationship, the Court observed:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. . . .

The rights to conceive and to raise one's children have been deemed 'essential' . . . , 'basic civil rights of man' . . . and '[r]ights far more precious than property rights.'

. . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'

*Id.* at 651. Other courts have concluded that interference with custodial rights by the state invokes a responsibility to make counsel available. In *Cleaver v. Wilcox*, 40 U.S.L.W. 2658, General Law Section (March 22, 1972), a federal district court held unconstitutional failure to provide counsel to indigent parents charged with neglect. The traditional distinction between "civil" and "criminal" matters was not thought dispositive of the issue:

[W]hether the proceedings be labeled "civil" or "criminal," it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel. . . . Since the state is the adversary . . . there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel. The parent's interest in the liberty of the child, in his care and in his control, has long been recognized as a fundamental interest. . . . Such an interest may not be curtailed . . . [without the parent being] heard, which in these circumstances includes the assistance of counsel.

*Id.* at 2659. *Accord*, *In re B*, 30 N.Y.2d 352, 356, 334 N.Y.S.2d 133, 136 (1972). See *State v. Jamison*, 251 Ore. 114, 444 P.2d 1005 (1968) (proceeding to terminate parental rights); Note, "Representation in Child Neglect Cases: Are Parents Neglected?" 4 *Colum. J. of Law and Social Problems* 230 (1968); Note, "Child Neglect: Due Process for the Parent," 70 *Colum. L. Rev.* 465 (1970). State legisla-



tures as well have increasingly recognized the parent's need for legal representation.\*

These analyses better reflect the import and significance of neglect and dependency proceedings than the traditional view, particularly in view of the fact that, as a California commentator has observed, "once dependency is adjudged over 50 percent of the cases are not terminated for over two years. Twenty-eight percent of the cases are not terminated even after four years." R. Boches & J. Goldfarb, *California Juvenile Court Practice* 165 (1968).

The present standard also calls for independent representation for children subject to any proceeding that may affect their custody or status, including those involving neglect, dependency, custody or adoption. Optimally, of course, two opposing counsel will already be involved in many of these cases. While the parties and their lawyers can be expected to present many of the legal and factual propositions bearing on the existence of neglect and the appropriate dispositional orders where neglect is established, it should also be apparent that neither of their interests can safely be assumed to coincide entirely with the child's. Each may bring a distinctive perception of social reality to the matter. See *In re Raya*, 255 Cal. App.2d 260, 63 Cal. Rptr. 252 (1967). For tactical or other reasons, factual propositions may be developed only selectively or not at all. Similarly, personal or institutional considerations may unduly constrict the dispositional alternatives investigated and presented to the court. Accordingly, independent representation for the child whose future is largely at issue seems desirable. See Isaacs, "The Role of Counsel in Representing Minors in the New Family Court," 12 *Buff. L. Rev.* 501, 519 (1963).

While independent representation for a child may be important in protective and custodial proceedings, a representative trained wholly in law may not be the appropriate choice for this function. See Boches & Goldfarb, *supra* at 163. Unlike delinquents, dependent and neglected children are typically very young; a California authority reports that 26 percent of the dependency cases involved children under four years of age and 57 percent were younger than nine years. The same is often true of children subject to adoption and

\*E.g., Ariz. Rev. Stat. Ann. §8-225; Calif. Welf. & Inst. Code §634 ("may"); Conn. Gen. Stat. Ann. §17-66(b); Idaho Code §16-1631; Ill. Rev. Stat. ch. 37, §701-20; Iowa Code §232.28; Neb. Rev. Stat. §43-204; N.M. S.A. §13-14-25(F); N.D.C.C. §27-20-26; Ohio Rev. Code Ann. §2151.352, Rules of Juvenile Procedure, Rule 4; Ore. Rev. Stat. §419.498; Pa. Stat. Ann. tit. 11, §50-317; Utah Code Ann. §55-10-96.

custody matters. Surely it cannot be expected that five year olds can in any useful sense judge where their "best interests" lie or even communicate their desires to counsel. While many lawyers may, with training and experience, become intelligent consumers of psychological information and devices, they usually will not be expert in diagnosis and evaluation.

Accordingly, it would not seem irresponsible to suggest that a professional trained in psychology, psychiatry, social psychology or social welfare be assigned the initial responsibility for protecting children under these circumstances. There is, however, no evidence that this alternative is presently available, either in terms of numbers of competent personnel or in terms of occupational independence from official and interested agencies. Perhaps this circumstance accounts in part for the belief in New York that, despite the young child's inability to communicate usefully with counsel, "the law guardian should be a vital factor in developing the necessary facts before the court and in protecting the interests of the child in those proceedings." *Report on Legal Representation of Indigents in the Family Court Within the City of New York* 42 (1973). That this view has found support elsewhere is suggested by the existence of a number of statutes providing for appointment of counsel on behalf of the child subject to neglect proceedings.\* The present standard shares the view that until there are sufficient numbers of independent, competent personnel trained in other disciplines who will undertake to ascertain and guard the child's interests in these proceedings, continued reliance on legal representation for the child is necessary.

It should also be clear that the need for representation is not limited to the adjudication stage. Counsel's services may be equally or more important at prejurisdictional hearings and for disposition. See Parts IV, VI and IX *infra*; Boches & Goldfarb, *supra* at 170-172, 179. In addition, there may be postdispositional hearings relating to continuation, modification or termination of existing orders. *E.g.*, Calif. Welf. & Inst. Code §§ 729, 775, 778. The lawyer's responsibility with respect to these matters has been usefully analogized to participation in the original dispositional hearing. Boches & Goldfarb, *supra* at 180.

\**E.g.*, Alaska Rules of Juvenile Procedure, Rule 15; Ariz. Rev. Stat. Ann. §8-225; Idaho Code §16-1809; Neb. Rev. Stat. §213-205; N.D.C.C. §27-20-26; Ohio Rev. Code Ann. §2151.35.2, Rules of Juvenile Procedure, Rule 4; Ore. Rev. Stat. §419.498; Utah Code Ann. §55-10-96; Wyo. Stat. §14-115.23; N.Y. Fam. Ct. Act §249.

## 2.4 Stages of proceedings.

### (a) Initial provision of counsel.

(i) When a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to the availability of legal counsel.

(ii) In administrative or judicial postdispositional proceedings which may affect the juvenile's custody, status or course of treatment, counsel should be available at the earliest stage of the decisional process, whether the respondent is present or not. Notification of counsel and, where necessary, provision of counsel in such proceedings is the responsibility of the judicial or administrative agency.

### *Commentary*

Legal representation in screening, judicial and administrative proceedings which may affect a juvenile's custody, status or course of treatment is viewed throughout these standards as important and desirable. See especially §§ 4.1, 6.1, and Part X *infra*, and commentaries thereto. Provision of counsel at the earliest opportunity is an obvious concomitant. In many instances, however, it is too much to expect the child or the parents to appreciate the need for representation from the outset or to notify counsel of current circumstances. It is also frequently the case that time is of the essence; juvenile codes, for example, typically provide strict time limits for intake and detention hearings when the juvenile has been taken into custody.\* Virtually all of these statutes currently require the authority seeking or taking action with respect to the juvenile to notify the parents, guardian or other responsible relative of the action and of the child's circumstances. It also seems appropriate to require that authority to provide advice and assistance concerning legal representation, particularly during preliminary proceedings. Where a juvenile has been detained, it would fall to detention personnel to

\**E.g.*, Calif. Welf. & Inst. Code §§631-32 (child must be released within forty-eight hours unless petition has been filed; detention hearing must be held as soon thereafter as possible, and not later than the next judicial day); Ill. Rev. Stat. ch. 37, §703-5 (detention hearing before judicial officer must be held within thirty-six hours of taking into custody); N.Y. Fam. Ct. Act §729 (detention hearing must be held within forty-eight hours of taking into custody).

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ascertain whether the juvenile is currently represented by counsel and, if so, to inform the attorney (and any other persons who by law must be so advised) of the child's location and situation. If the juvenile has not previously been represented but he or she or the parents are apparently indigent, they should be told of the availability of counsel and rendered any assistance in contacting an attorney required under the circumstances. In the event the child is not detained, the intake department ordinarily will have the original formal contact with the matter and should undertake the responsibilities described above prior to holding an intake hearing.

Similar considerations operate with respect to postdispositional matters. Many decisions concerning course or place of treatment are made within an institution and with considerable dispatch. It is, therefore, reasonable and perhaps necessary to locate responsibility for notification of counsel and assistance in obtaining counsel with the agency, institution or judicial department seeking to take action.

**2.4(b) Duration of representation and withdrawal of counsel.**

(i) Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable.

(ii) Once appointed or retained, counsel should not request leave to withdraw unless compelled by serious illness or other incapacity, or unless contemporaneous or announced future conduct of the client is such as seriously to compromise the lawyer's professional integrity. Counsel should not seek to withdraw on the belief that the contentions of the client lack merit, but should present for consideration such points as the client desires to be raised provided counsel can do so without violating standards of professional ethics.

(iii) If leave to withdraw is granted, or if the client justifiably asks that counsel be replaced, successor counsel should be available.

*Commentary*

This standard follows the view adopted by the American Bar Association with regard to duration of and withdrawal from representation in criminal matters. ABA, *Standards Relating to Providing Defense Services* §§ 5.2 and 5.3. The same principles generally apply in civil representation as well. See ABA, *Code of Professional Responsibility* EC 2-31 and EC 2-32 (continuity) and DR 2-110

(withdrawal). 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.

Adoption of the adult standard regarding withdrawal reflects the conviction that parties faced with juvenile court proceedings are entitled to assert their positions concerning the charges facing them and that every effort should be exerted to avoid unnecessary prejudice when they do so. In particular, lawyers should not withdraw or threaten to withdraw their services because they believe rehabilitative or protective services are needed and their client wishes to oppose the exercise of court jurisdiction upon which such services are predicated. The grounds for relinquishment of responsibility for representation by counsel are in all classes of matters closely circumscribed by the ABA *Code of Professional Responsibility*, DR 2-110, and the same principle should control the behavior of lawyers in juvenile court proceedings.

When counsel does withdraw, the need for a successor is obvious. See ABA, *Standards Relating to Providing Defense Services* § 5.3, Comment b. The former attorney should seek to protect the client against disadvantage consequent upon withdrawal by promptly delivering any papers to which the client is entitled and by cooperating fully with successor counsel. ABA, *Code of Professional Responsibility* EC 2-32; H. Drinker, *Legal Ethics* 140-41 (1963).

### PART III. THE LAWYER-CLIENT RELATIONSHIP

#### 3.1 The nature of the relationship.

##### (a) Client's interests paramount.

However engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.

##### *Commentary*

However engaged, counsel's principal responsibility lies in full and conscientious representation of a client's legitimate interests. ABA, *Standards Relating to the Defense Function* § 1.6, p. 190. No lesser obligation exists when youthful clients or juvenile court proceedings

are involved. It has, however, been observed, with respect to both criminal and juvenile courts, that defense lawyers who regularly practice within a court tend to accommodate their style of representation to that court's bureaucratic and, perhaps, ideological requirements and to the needs of personnel with whom they come in daily contact. Public defenders in adult proceedings have been described as accepting that "what goes on in this business is what goes on and what goes on is the way it should be." Their assimilation ("cooptation") into the court's processes is such that they "will not cause any serious trouble for the routine motion of the court conviction process." Sudnow, "Normal Crimes: Sociological Features of the Penal Code in the Public Defender Office," 12 *Social Problems* 255, 273 (1965). The client's interests, at least as defined by him, do not constitute the central focus around which defense posture and strategy are to be formed; rather, the public defender seeks to exercise "client control" as a method of operating comfortably within the court's structure and with its personnel.

The same phenomenon has been observed in representation of children. Edwin Lemert noted, in his study of California juvenile courts, that

Employing public defenders . . . may also cause counsel to be coopted into the organization of the court, even become its superficial appendage. . . . Public defenders may come to justify their passive roles on the grounds that they do not want to add to the work of already overburdened probation officers; but more important is the arousal of a differential reaction toward juvenile offenders. The following statement is illustrative:

"Ordinarily I stipulate that the probation officer's report is acceptable in the jurisdictional hearings. Otherwise he would have to bring in witnesses. In many such cases, perhaps most, the evidence would not support the judgment, but I hate to see a young kid get the idea that he can get away with something. One 15 year old boy who broke into a bar and took a case of beer told me in an interview that his problem was that he got caught. I became indignant and asked him if he wasn't too young to drink. The boy said, "No, only too young to buy." I decided he needed to be jolted—maybe with a stay in detention—so I encouraged him to admit his guilt in court. No *corpus delicti* needed to be established. If it had been an adult case I would have taken the position that the D.A. could not prove his case, because the beer was never found and not even reported until a month after it disappeared."

E. Lemert, *Social Action and Legal Change: Revolution Within the Juvenile Court* 178 (1970). In this instance, cooptation has taken

the form of accepting the traditional juvenile court child-saving norms as a principle for ascertainment of defense posture and strategy. See also Platt, Schechter & Tiffany, "In Defense of Youth: A Case Study of the Public Defender in Juvenile Court," 43 *Ind. L. J.* 619 (1968).

Similar strategies have been employed by private practitioners as well, particularly those who engage primarily in criminal court practice, e.g., A. Blumberg, *Criminal Justice* 95-115 (1970); Skolnick, "Social Control in the Adversary System," 11 *Journal of Conflict Resolution* 52 (1967), and there is reason to expect that private practitioners in juvenile courts also accommodate themselves and their clients to prevailing structural and personnel requirements. See Platt & Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 *U. Pa. L. Rev.* 1156 (1968).

In light of these constraints on representation in practice, the general standard set forth in section 3.1(a) should be considered substantive and not merely hortatory. Adversarial representation and devotion to a client's perceived interests may be more or less inconvenient for counsel in juvenile court; this consequence is, however, part of the lawyer's professional role and must be accepted.

### **3.1(b) Determination of client's interests.**

#### **(i) Generally.**

In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.

#### **(ii) Counsel for the juvenile.**

[a] Counsel for the respondent in a delinquency or in need of supervision proceeding should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged. It is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.

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

[c] In delinquency and in need of supervision proceedings, where it is locally permissible to so adjudicate very young per-

sons, and in child protective proceedings, the respondent may be incapable of considered judgment in his or her own behalf.

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

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

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

(iii) Counsel for the parent.

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

*Commentary*

The ABA *Code of Professional Responsibility*, EC 7-1, emphasizes that "in our government of laws and not men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense." This entitlement clearly implies that it is for the client to choose whether to pursue a lawful objective or present a lawful defense and that counsel's function in legal proceedings will largely be determined according to the client's choices. In criminal prosecutions it has long been clear that the plea is a decision to be made by the defendant and not by counsel. ABA, *Standards Relating*



to the Defense Function § 5.2(a) and Commentary thereto; *Machibroda v. United States*, 368 U.S. 487, 493 (1962). The only significant instances of departure from this principle occur when clients are incapable of understanding the proceeding in which they find themselves and therefore cannot rationally determine their interests in the matter. See, e.g., *State v. Hebert*, 186 La. 308, 172 So. 167 (1937) (incompetence to stand trial); *List v. State*, 14 Md. App. 578, 308 A.2d 451 (1973) (entrance of insanity plea); *In re Basso*, 299 F.2d 933 (D.C. Cir. 1962); New York County Lawyer's Ass'n Op. No. 88 (1916) (civil commitment). There is, moreover, recent authority suggesting that choice of posture should be reserved for the client even in cases of this kind. See *Lessard v. Schmidt*, 349 F.Supp. 1078 (E.D. Wis. 1972) (civil commitment proceedings); *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 217 N.E.2d 636 (1966) (appeal from commitment proceedings). The same general principle governs representation in civil matters; whether to press a lawful claim, to make or accept a settlement offer, or to interpose a good faith defense are decisions for the client and not the attorney.

The traditional allocation of responsibility for choice of posture or plea is retained by this standard on the ground that it best comports with the position of an individual charged with misconduct and with the role which counsel can most usefully discharge. The reasons for following this principle, rather than routinely treating counsel as a guardian ad litem or as a neutral amicus curiae, are developed in the Introduction. However, the standard does not preclude the appointment of the juvenile's counsel to serve as guardian ad litem in appropriate cases. In most instances, even a youthful client will be mature enough to understand, with advice of counsel, at least the general nature of the proceedings, the acts with which he or she has been charged, and the consequences associated with the pending action. On this basis a juvenile client can decide whether to accede to or contest the petition. That, in essence, is what is required of the defendant in criminal proceedings and should suffice for juvenile court purposes. Although counsel may strongly feel that the client's choice of posture is unwise, and perhaps be right in that opinion, the lawyer's view may not be substituted for that of a client who is capable of considered judgment according to the standard described above.

**Counsel for the Incompetent Juvenile.** There are, of course, juvenile clients, as there are adult clients, who cannot be deemed capable of considered judgment regarding their position in the proceeding. In some jurisdictions, children of very tender years may be and are

occasionally made the subject of delinquency or in need of supervision petitions. Moreover, section 2.3(b), *supra*, encourages appointment of independent counsel for minor subjects of adoption, custody, neglect and dependency proceedings; this group typically includes many very young children. For cases of these kinds, which closely approximate adult cases involving incompetence to stand trial, section 3.1(b) (ii) (c) sets forth a narrow exception to the general principle that clients should determine their own interests in the proceeding. Under this provision, counsel may do one of three things. He or she may, particularly in child protective proceedings, refuse to adopt any particular posture in the case and limit all activity to investigation, presentation and examination of evidence material to the proceeding, including the expressed wishes of the client. This approach has regularly been adopted by the New York Legal Aid Society for those neglect and dependency cases where clients are too young to understand the nature of the action. New York Legal Aid Society, *Manual for New Attorneys* 217-18 (1971). Maintenance of a neutral position in delinquency and in need of supervision cases, however, is less likely to be a significant alternative, since the youth is a party to the action. In view of the realistic limits associated with legal training and the special problems of dealing with very young children, preference for resort to a guardian ad litem is expressed.

If neither neutrality nor reliance on a guardian is feasible, counsel has, of course, no choice except to take responsibility for choice of plea. In this circumstance, the attorney should thoroughly investigate the client's desires, needs, the facilities available for the child within the community and through the court, and all other matters that reasonably bear on the child's interests in the proceeding. Additionally, this section urges that, after such an inquiry, counsel adopt the position requiring the least intrusive intervention, if any, justified by the child's circumstances. Preference for the least drastic intervention feasible under the facts is justified in part by caution concerning the lawyer's expertise in psychosocial diagnosis; it also finds support in principle. Juvenile court legislation has always preferred treatment in the home to more radical dispositional choices, with commitment viewed, at least in principle, as a "last resort." See, e.g., Ill. Rev. Stat. ch. 37, § 701-2; N.M.S.A. § 13-14-2(A) & (C) (Supp. 1972); Uniform Juvenile Court Act § 1(3); *In re Braun*, 145 N.W.2d 482 (N.D. 1966); *In re Kroll*, 43 A.2d 706, 709 (D.C. Mun. Ct. App., 1945). Other current authority also supports advocacy of the least intrusive form of intervention. Goldstein, Freud and Solnit, in their book, *Beyond the Best Interests of the Child* (1973), urge "the least detrimental available alternative for safeguarding the

child's growth and development" as the appropriate general standard for intervention in child placement. *Id.* at 53. These authors, together with others, emphasize the importance of continuity in child-family relations and the difficulty experienced by judicial and correctional agencies in managing so complex and delicate a relationship as that between parent and child. *Id.* at 7-8.

**Counsel for the Parent.** Counsel will, ordinarily, be retained or appointed on the parent's behalf only in neglect or dependency matters, although their participation in delinquency cases is contemplated by other volumes of the IJA-ABA Juvenile Justice Standards Project. In these cases, as in other proceedings, the lawyer's principal function lies in urging before the court those propositions of fact and law which the client wishes to advance. R. Boches & J. Goldfarb, *California Juvenile Court Practice* 178 (1968); see Rosenheim, "The Child and His Day in Court," in G. Newman, *Children in the Courts* 150, 162 (1967). Advocacy for the parent is a necessary and appropriate professional responsibility; the lawyer "not only facilitates effective articulation of a point of view, but, by his discharge of the task of representation, he aids in the clarification of issues." Rosenheim, *supra* at 162; see Burt, "Forcing Protection on Children and Their Parents: The Impact of *Wyman v. James*," 69 *Mich. L. Rev.* 1259, 1282 (1971). This responsibility takes on special importance in child protective proceedings, having regard to the often sweeping scope of neglect and dependency definitions and to the tendency of some courts and agencies mechanically to apply middle class socioeconomic standards to poor minority families not accepting or living by these standards. Not only may questionable inferences concerning parental adequacy result from this process, but official intervention may well produce worse results than would continued reliance on a home that is "substandard" according to dominant socioeconomic measures. See *In re Raya*, 255 Cal. App.2d 260, 63 Cal. Rptr. 252 (1967); Kay & Phillips, "Poverty and the Law of Child Custody," 54 *Calif. L. Rev.* 717, 736-38 (1966). The parent who is potentially subject to an intrusion into his or her constitutionally recognized custodial interest in a child and to the stigmatization accompanying such intervention is entitled to present these and other issues for judicial consideration. In this endeavor, the parent is also entitled to the wholehearted advocacy of legal counsel. See Boches & Goldfarb, *supra* at 178.

### 3.2 Adversity of interests.

#### (a) Adversity of interests defined.

For purposes of these standards, adversity of interests exists when

a lawyer or lawyers associated in practice:

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

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

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

*Commentary*

**Adversity in General.** The rule prohibiting representation of adverse interests applies to any lawyer or lawyers associated in practice, whether in a private firm or a defender or legal services agency. This position is consistent with ABA, Informal Opinion 1233 (1972), which states that "the professional standards regarding representation of differing interests apply to legal aid offices the same as to other lawyers." *Accord, Borden v. Borden*, 277 A.2d 89 (D.C. Ct. App. 1971). It has, with some force, been argued that the principal risks associated with representation of adverse interests—breaches of confidentiality and lack of entire loyalty to either client—are minimized or nonexistent in some legal aid agencies, particularly where the parties may be provided counsel serving in separate offices with separate facilities. Moreover, legal aid (and defender) agencies provide counsel for persons who, because indigent, may not be able to secure independent representation. Accordingly, refusal to allow such an agency to represent both parent and child may mean that one of the applicants will effectively be deprived of legal assistance. Comment, "Legal Aid Divorce Representation and Conflict of Interests," 6 *U. Cal. Davis L. Rev.* 294 (1973). See also, ABA, Informal Opinion 1235 (1972), allowing simultaneous representation of apparently adverse interests by Coast Guard legal aid offices.

Although the matter is not free from doubt, the traditional view set forth in *Borden* and Informal Opinion 1233 seems preferable. Certainly it is more likely that unassociated attorneys will focus entirely on each client's interests than will lawyers with a specially close working relationship. There are, doubtless, instances where legal aid lawyers serving in separate offices are unaffected by the fact of common employment; nevertheless, the risks of breach of

confidence and dilution of loyalty are somewhat greater in this situation. As an institutional matter, it is better to rely on statutory provision or inherent judicial power to provide independent appointed counsel for the party excluded from legal aid or defender services. It is encouraging to note in this connection that juvenile court acts increasingly allow appointment of separate counsel for both parent and child involved in juvenile proceedings. *E.g.*, NCCD, Model Juvenile Court Rules, R. 39; Calif. Welf. & Inst. Code § 634; N.M.S.A. §§ 13-14-25(F) & (G) (Supp. 1972) (neglect proceedings).

**Instances of Adversity.** Subsection (i) incorporates the traditional definition of conflict of interests set forth in Canon 6 of the *Canons of Professional Ethics* (1967): “[A] lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.” Subsection (ii) extends this rule to instances where the demands of strategy or advocacy require an attorney to argue on one client’s behalf a proposition which, if accepted by the judge or jury, would prejudice another client’s position. Substantial injury to a client’s interests may occur in multiple representation situations even when conflicting factual or legal theories are not necessary to trial of the case. This form of adversity is, perhaps, most likely to arise during dispositional hearings, although it may do so at any stage of proceedings. As the California Supreme Court observed in *People v. Chacon*, 69 Cal.2d 765, 447 P.2d 106, 112 (1968), one lawyer “cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty.” And, even during the course of trial, counsel representing co-respondents may effectively be disabled from stressing evidence that points to one of his clients as less culpable than the other. *Ibid.*

Careful application of these principles ordinarily should lead counsel to avoid representation of both parent and child or more than one party in juvenile court matters. In neglect and dependency cases, there is surely more than a speculative possibility of adversity between the interests of the parent and those claimed by or to be asserted on behalf of the child. Isaacs, *The Role of Counsel in Representing Minors in the New Family Court*, 12 *Buff. L. Rev.* 518-19 (1963); R. Boches & J. Goldfarb, *California Juvenile Court Practice* 169-70 (1968). See also ALI, Uniform Parentage Act § 9 (1973), prohibiting appointment of a child’s mother or father as guardian in a paternity action. Frank conflict may also occur in delinquency or PINS (Persons in need of Supervision) proceedings where the parent is, formally or in fact, responsible for initiating the action. An empirical

study of juvenile courts in three cities revealed that such conflict was by no means uncommon even in delinquency matters; the parents acted as complaining witnesses in 17 percent of the observed delinquency cases in one city and in 11 percent of the cases in each of the other two. Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and its Implementation*, 3 *Law & Soc. Rev.* 491, 548 (1969). One would expect the incidence to be considerably higher in PINS cases, particularly where "incurability" or "runaway" is charged.

With regard to other supervision and delinquency matters, the possibility of adversity of interests is less obvious but not of less significance. The parent may want the child to admit charges that the latter wishes, for whatever reason, to contest. Other parents may believe that, legal issues aside, court intervention is generally desirable in view of the child's attitude or behavior. There are also parents who desire to be relieved of further responsibility for the child, and court wardship presents an avenue for realizing that goal, at least temporarily. See Lefstein, Stapleton & Teitelbaum, *supra* at 548-49; Comment, *The Attorney-Parent Relationship in The Juvenile Court*, 12 *St. Louis U. L.J.* 603, 620 (1968). The study cited above indicated a startlingly high incidence of patent conflict of this sort between parents and children even where the parent did not, in effect, initiate the proceeding. Moreover, observed hostility represents only the tip of the iceberg, as the authors note:

In addition, there are many instances in which the parent may be largely disinterested or apathetic toward the proceedings, or where he feels embarrassed or inconvenienced by the necessity of appearing at court. If the parent is so affected, he may wish to get the ordeal over with as quickly as possible in order to get home to other children, or back to work, or to avoid further expenses which he can ill afford, or to avoid further embarrassment.

Lefstein, Stapleton & Teitelbaum, *supra* at 548-49. These concerns—which are understandable from the parent's point of view—may subtly or overtly interfere with counsel's determination of a course of representation for the child. Because of this risk, and because early determination of such subjective attitudes is often impossible, a lawyer should decline to undertake representation for both parent and child in all cases.

The same position is adopted with regard to representation of co-respondents in juvenile court proceedings. The dangers inherent in this practice have long been appreciated. See *Glasser v. United*

*States*, 315 U.S. 60 (1942); *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967); *People v. Chacon*, 69 Cal.2d 765, 447 P.2d 106 (1968). Frequently, the existence of adversity cannot be ascertained during initial interviews or at an early stage of the proceedings. The prosecutor may be willing to dismiss charges against one co-respondent in exchange for testimonial cooperation, a decision perhaps reached only after both clients have fully disclosed their positions to counsel. Adversity may appear only after a number of interviews with both clients, since children—like adults—may be less than candid with their attorneys at the outset of the relationship. The likelihood of adversity appearing after trial, emphasized in *People v. Chacon*, 69 Cal.2d 765, 447 P.2d 106 (1968), is if anything more salient in juvenile court matters, since dispositional decisions are highly individualized and may not necessarily bear any relationship to the underlying conduct. Even where no actual adversity exists, the fact of joint representation may well increase the sense of injustice of less fortunate clients at proceedings where they have received different and more severe treatment than co-respondents who have engaged in the same behavior. Cf. D. Matza, *Delinquency and Drift* 111-12 (1964).

Conflicts of interest also may arise when one attorney represents two or more children who are the subjects of neglect or dependency petitions. Sisters or brothers may have different needs and desires; such divergent interests may necessitate the appointment of additional counsel.

Subsection (iii) forbids conflicting loyalties between a client and third persons. In view of the youth and lack of means characteristic of juvenile court clientele, it rarely happens that counsel receives compensation from the respondent. Fees, if any, are usually paid by the parent or, more commonly, through an appointed counsel system or institutional employer. Under certain circumstances it may be unethical for the attorney to accept payment from the client's parent, as in child protective proceedings where the parent is also the respondent. See Los Angeles County Bar Association, *Ethics Opinions*, Opinion 1964-1; Isaacs, *supra* at 501, 518-19. Even where the parent is not a party to the juvenile court proceeding, an attorney cannot allow the desires of a third person to affect his or her representation. ABA, *Code of Professional Responsibility* DR 5-107(b), EC 5-21. Counsel should, therefore, immediately and candidly explain to the person offering payment that a lawyer's entire loyalty is to the client and that the parent or other person who pays the lawyer's fee may exercise no control over the case. Counsel must, as well, seek the client's consent to the fee arrangement, ABA,

*Code of Professional Responsibility*, DR 5-107(a) (1), and should either reject the offer of compensation, or, if allowable, withdraw from the case if the child objects to payment by the parent or other person.

The attorney has no less duty to insist on devotion to the client's interest when an institutional employer such as a public defender system seeks to impinge on the exercise of independent professional judgment in the client's behalf. ABA, *Code of Professional Responsibility* EC 5-23; see commentary to § 3.1, *supra*. Cooperation with opposing counsel and probation and court personnel, emphasis on law reform cases, and the like may well be legitimate organizational goals but, once representation of an individual has been undertaken, such goals cannot justify deviation by counsel from the lawyer's primary duty of loyalty to the client's interests.

**3.2(b) Resolution of adversity.**

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

*Commentary*

A lawyer should never represent in litigation clients with conflicting or adverse interests. See ABA, *Code of Professional Responsibility* EC 5-15. Moreover, an attorney should refuse employment in cases of potential adversity. *Ibid*. Although it has been suggested that counsel may, with the consent of both parties, continue multiple representation in this event, Comment, 12 *St. Louis U.L.J.* 603, 622 (1968), such conduct is here disapproved. In the context of criminal cases, the prejudicial impact of defending clients with adverse interests has been strongly emphasized. *Glasser v. United States*, 315 U.S. 60 (1942); *People v. Chacon*, 69 Cal.2d 765, 447 P.2d 106 (1968); ABA, *Standards Relating to the Defense Function* § 3.5. It is preferable that these consequences not be invited, in both juvenile and criminal representation. Accordingly, once the existence of adversity is established, counsel should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal. See ABA, *Code of Professional Responsibility* EC 5-15.



### 3.3 Confidentiality.

#### (a) Establishment of confidential relationship.

Counsel should seek from the outset to establish a relationship of trust and confidence with the client. The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for effective representation, and at the same time explain that the lawyer's obligation of confidentiality makes privileged the client's disclosures relating to the case.

#### *Commentary*

Great importance has traditionally been attached to the principle that communications between client and attorney are protected from disclosure except in narrowly defined and exigent circumstances. The very purposes for creation of a professional relationship often require clients fully to reveal their private motives, thoughts and acts. ABA, Opinion 287 (1953). Unconsented disclosure of such matters would naturally inhibit their making and thus "utterly destroy and prevent the usefulness and benefits to be derived from professional assistance." *Ibid.* The rule of confidentiality lies at the heart of our legal system; "It is essential to the administration of justice that there should be perfect freedom of consultation by client with attorney without any apprehension of a compelled disclosure by the attorney to the detriment of the client." ABA, Opinion 91. *Accord*, ABA, Opinions 287 (1953), 250 (1943), 150 (1936); 8 J. Wigmore, *Evidence* § 2292 (McNaughton Rev., 1961).

This guarantee is equally important, both to the client and to the administration of justice, in juvenile court representation. Children faced with such proceedings are as much in need of legal advice and assistance as adults who find themselves involved in civil or criminal actions. *In re Gault* 387 U.S. 1, 36 (1967); commentary to section 1.1, *supra*. While it has occasionally been said that counsel should reveal "facts pointing to the need for treatment . . . (in) fulfillment of the duty the attorney must assume, as an officer of the court . . .," NCCD, *Procedure and Evidence in Juvenile Courts* 43 (1962), such a rule will make candid discussions of all relevant facts with the lawyer impossible and is necessarily and fatally destructive to the right to counsel itself. Children, often enough, find themselves in the lawyer's office against their wishes and bring with them antagonism directed toward all adults. H. Freeman & H. Weihofen, *Clinical Law Training* 248 (1972). If lawyers reveal a supposed duty to pass on what they learn without their clients' consent, any further

relationship must be artificial and, for all legitimate purposes, dysfunctional. Should lawyers not advise their clients in this regard, they practice a deception which reflects the gravest discredit on themselves, on their profession and on the system of justice generally. Counsel's duty "to the court," as the *ABA Code of Professional Responsibility* makes clear, is an integral part of the lawyer's responsibility to the administration of justice; here, as elsewhere, it is discharged by vigorous representation of the client's interests.

As in representation generally, counsel should seek to establish a relationship of trust and confidence with the client at the earliest point. The lawyer should explain to the client and, if appropriate, the client's parents, the rule prohibiting unconsented disclosure. When an associate or employee is present, the attorney should make clear that they too are covered by the principle of confidentiality. Nevertheless, it is true to say that, particularly with children, creating an atmosphere of candor and trust can be unusually difficult. If lawyers are perceived as part of an authoritarian adult establishment, they may encounter suspicion, hostility, flippancy, indifference and other forms of antagonistic behavior. Freeman & Weihofen, *supra* at 248. Both for purposes of establishing the basic professional relationship and for purposes of counseling within that relationship, attorneys must sometimes devise constructive responses to initially unpleasant contact with clients. *Id.* at 248-49.

**3.3(b) Preservation of client's confidences and secrets.**

(i) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal a confidence or secret of a client to another, including the parent of a juvenile client.

(ii) Except as permitted by 3.3(d), below, an attorney should not knowingly use a confidence or secret of a client to the disadvantage of the client or, unless the attorney has secured the consent of the client after full disclosure, for the attorney's own advantage or that of a third person.

*Commentary*

The injunction to preserve both "confidences" and "secrets" follows the *ABA Code of Professional Responsibility*, DR 4-101(A), in recognizing that confidentiality as a matter of professional ethics is a broader principle than the legally enforced attorney-client privilege. In the *Code*, the term "confidence" refers to information protected by the legal privilege under applicable law and "secret" refers to other information gained through the professional rela-

tionship which the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client. Whether a communication is privileged, and thus a "confidence," is not always clear and, in any event, turns on local law. For example, while a disclosure in the presence of a third party ordinarily will not be treated as privileged, J. Wigmore, *Evidence* § 2326, (McNaughton rev. 1961), the rule may differ if the third party is present in such capacity as to be identified with the client. H. Drinker, *Legal Ethics* 135 (1953). Thus, a communication may be entitled to legal protection though, as sometimes happens, the client is accompanied by a parent. *Ibid*; *Bowers v. State*, 29 Ohio St. 542, 546 (1876). Counsel should thus be aware of local law concerning recognition of an attorney-client privilege under such circumstances.

Privacy of lawyer-client communications, whether "confidences" or "secrets," obtains with respect to all other persons except as specifically provided by law or ethical rule. It follows that, absent such justification, an attorney may not reveal to a parent statements by the juvenile client made within the professional relationship. While it may appear that such an injunction will drive a wedge between child and parent, it should be recalled that the lawyer may counsel the client to reveal the information in question. If, despite such advice, the child continues to insist on nondisclosure, it is fair to assume that a wedge of some kind already exists, independent of the attorney's behavior. To allow breach of the duty of privacy in these circumstances would severely disrupt the lawyer-client relationship and might, if anything, further confirm the child's distrust, not only of the attorney, but of the child's parent as well. With respect to the special case of the very young client, section 3.3(d) (1) expressly allows divulgence of confidential communications in situations where such action will not conflict with the child's interests and there may be some identifiable advantage to the client, including those benefits associated with counseling the child and the family.

Subsection (ii) carries over the generally applicable rule concerning use of a secret or confidence to the client's disadvantage or, without consent, to the advantage of counsel or some third person. ABA, *Code of Professional Responsibility* DR 4-101(B). Opportunities for abuse of this sort are uncommon in juvenile court representation; in most situations a lawyer might possess confidential information advantageous to the interests of others only in child protective matters.

### **3.3(c) Preservation of secrets of a juvenile client's parent or guardian.**

**The attorney should not reveal information gained from or concerning the parent or guardian of a juvenile client in the course of**

representation with respect to a delinquency or in need of supervision proceeding against the client, where (1) the parent or guardian has requested the information be held inviolate, or (2) disclosure of the information would likely be embarrassing or detrimental to the parent or guardian *and* (3) preservation would not conflict with the attorney's primary responsibility to the interests of the client.

(i) The attorney should not encourage secret communications when it is apparent that the parent or guardian believes those communications to be confidential or privileged and disclosure may become necessary to full and effective representation of the client.

(ii) Except as permitted by 3.3(d), below, an attorney should not knowingly reveal the parent's secret communication to others or use a secret communication to the parent's disadvantage or to the advantage of the attorney or of a third person, unless (1) the parent competently consents to such revelation or use after full disclosure or (2) such disclosure or use is necessary to the discharge of the attorney's primary responsibility to the client.

#### *Commentary*

Counsel is likely, during the course of representing a minor client, to discuss with the child's parents matters relating to the child's relatives and others. Failure to seek information of this kind may well qualify as abrogation of the lawyer's duty of prompt investigation. See § 4.3 and commentary thereto, *infra*. Moreover, knowledge concerning these matters is often essential to effective counseling for the child. See § 5.4, *infra*. On the other hand, information received by an attorney from a person other than the client, with relatively few exceptions, falls outside the ambit of legal privilege. 8 J. Wigmore, *Evidence* §§ 2317-18 (McNaughton Rev., 1961). Since representation of both child and parent with respect to a juvenile court proceeding would constitute a conflict of interest, § 3.2(a), *supra*, statements given by the latter will ordinarily be subject at least to compelled disclosure. Moreover, the lawyer's loyalty to the client may, in certain cases, require the use of information acquired from the parent for the child's benefit. Neither of these last propositions may be obvious to the parent; rather, it probably is assumed that such discussions are important to the child's interests and therefore are entitled to absolute legal and ethical protection. This assumption is even more likely when the parent is paying counsel to represent the child. See H. Freeman & H. Weihofen, *Clinical Law Training* 247-48 (1972).

Section 3.3(c) seeks to recognize the parents' legitimate expectations and the general importance of interviewing and counseling with regard to family relationships by emphasizing the ethical obligation of lawyers to hold parents' "secrets" confidential to the extent they can consistent with rules of law and the primary responsibility to their clients' interests. Thus, any communication from a parent for which secrecy has been requested or which would probably embarrass or injure the parent should not be revealed, except pursuant to legal compulsion or if necessary to the discharge of counsel's duty to the child. By the same token, a secret communication from a parent is subject to the same protection as one from a client against use to the advantage of counsel or a third person. As a matter of candor and fair dealing, however, attorneys ought not solicit communications from parents or guardians of minors under a representation of confidentiality, nor should they encourage divulgence of secrets when it appears that a parent relies on an assumption of confidentiality and it is foreseeable that disclosure of the secret will become necessary. There will also be situations in which attorneys should affirmatively advise parents of the limits of confidentiality prior to such discussions, see, *e.g.*, commentary to § 3.2(b), *supra*.

**3.3(d) Disclosure of confidential communications.**

In addition to circumstances specifically mentioned above, a lawyer may reveal:

(i) Confidences or secrets with the informed and competent consent of the client or clients affected, but only after full disclosure of all relevant circumstances to them. If the client is a juvenile incapable of considered judgment with respect to disclosure of a secret or confidence, a lawyer may reveal such communications if such disclosure (1) will not disadvantage the juvenile and (2) will further rendition of counseling, advice or other service to the client.

(ii) Confidences or secrets when permitted under disciplinary rules of the ABA Code of Professional Responsibility or as required by law or court order.

(iii) The intention of a client to commit a crime or an act which if done by an adult would constitute a crime, or acts that constitute neglect or abuse of a child, together with any information necessary to prevent such conduct. A lawyer must reveal such intention if the conduct would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes disclosure is necessary to prevent the harm.

If feasible, the lawyer should first inform the client of the duty to make such revelation and seek to persuade the client to abandon the plan.

(iv) Confidences or secrets material to an action to collect a fee or to defend himself or herself or any employees or associates against an accusation of wrongful conduct.

*Commentary*

Section 3.3(d) follows the ABA *Code of Professional Responsibility*, DR 4-101(C), in specifying circumstances in which lawyers may reveal their client's confidences or secrets. Generally, these rules apply to juvenile cases as they do to other matters. In certain instances, however, their interpretation, given the characteristic youth of juvenile court clientele, requires special comment.

**Consent to Disclosure.** The confidential nature of communications between client and attorney may generally be waived by the former if there has been full disclosure of all material circumstances surrounding that decision. ABA, *Code of Professional Responsibility* DR 4-101(C) (1); ABA, Opinions 202 (1940), 320 (1968). The same rule applies to consent to disclosure of a confidence or secret given by a juvenile to his or her attorney. The lawyer should take care candidly to inform the client of all foreseeable consequences arising from such a decision, particularly where the information will be conveyed to court or probation department personnel. If counsel conscientiously discharges this responsibility, there is no reason in most cases for great concern with regard to the client's "competence" to consent to disclosure. Not only is there, by hypothesis, legal advice available but, in almost every instance, the significance of consent is no more difficult of comprehension than, for example, entrance of a plea to the charges.

In those cases where the client is very young and cannot be deemed capable of rational decision regarding disclosure of a confidence, the scheme set forth in section 3.1(b), concerning entrance of a plea, generally applies. If a guardian ad litem has been appointed, he or she may authorize waiver of confidentiality in the interests of the minor. See *Lietz v. Primock*, 84 Ariz. 273, 327 P.2d 288 (1958); *Yancy v. Erman*, 99 N.E.2d 524 (Ohio App. 1951). Where a guardian has not been appointed and the parent or parents' interests may be adverse, the attorney should have discretion to disclose a secret or confidence, if such disclosure will not be likely to be disadvantageous to the client and some benefit, either with respect

to rendition of legal services or in counseling, can be expected from that action.

**Confidences or Secrets Relating to Commission of a "Crime."**

Section 3.3(iii) incorporates the generally applicable rule that defense counsel may reveal the client's intention to commit a crime and must do so if disclosure is necessary to protect the life or safety of any person. ABA, *Standards Relating to the Defense Function* § 3.7(d); see ABA, *Code of Professional Responsibility* DR 4-101(C) (3). This exception to the principle of confidentiality should be construed narrowly for juvenile court matters as it has been in adult representation. The communication must relate to future, and not to accomplished conduct, ABA Opinion 287 (1953); Los Angeles County Bar Association, Ethics Opinions, Opinion 267 (1959); moreover, if the communication is privileged, that privilege continues even if the lawyer-client relationship is terminated. ABA, *Canons of Ethics*, Canon 37; ABA, *Code of Professional Responsibility* EC 4-6. Thus, counsel may not reveal a client's accomplished perjury, ABA, Opinion 287 (1953), nor the hiding place of a present or former client who is a fugitive from justice. ABA, Opinion 23 (1930); ABA, Informal Opinion 1141 (1970). There is authority to suggest that an attorney must reveal the location of a client who has violated bail by leaving the jurisdiction or has violated the terms of his parole. ABA, Opinion 155 (1936); ABA, Opinion 156 (1936). Where the violation has already occurred, however, the current validity of this position is open to some doubt. See ABA, Opinion 287 (1953). In addition, it appears that with respect to contemplated or contemporaneous perjury by a client, counsel is under a duty to urge the client to tell the truth and, if unsuccessful, to sever the professional relationship; counsel may not, however, directly reveal the fact of perjury to the court. See ABA, Opinion 287 (1953); ABA, Informal Opinion 869 (1965). The rules allowing disclosure of a confidence are intentionally limited to those situations in which the risk to others is so grave as to outweigh the general social importance of the attorney-client privilege; it is significant that relatively few such circumstances have been identified. Since children faced with juvenile court proceedings are as needy of skilled legal advice as adults involved in civil and criminal proceedings generally, and since confidentiality is no less important to candor and openness between youthful client and counsel, abrogation of the rule of silence must find justification in social risks as serious as those which justify disclosure in cases involving adults.

One special problem in this connection deserves mention: that of

the youthful client who reveals in confidence the intention to run away from home, where the attorney is certain that the intention will be carried out. It appears that both the principle of confidentiality and existing authoritative interpretations of that principle forbid disclosure of that communication. Running away certainly does not pose that serious threat to others which has generally justified breach of confidentiality. Whether the existence of a substantial risk of grave injury to the actor would permit disclosure of confidences or secrets is by no means clear. The caution with which exceptions to the rule of silence have been permitted, and the strength of the policy favoring maintenance of confidences, suggests that no such general exception would be recognized. *But cf.* New York County Bar Association, Opinion 88 (1916) (guardian in incompetency proceedings). In any event, it does not appear that running away routinely presents so substantial a threat even to the client's health and safety as to overwhelm the strong social interests served by insistence on confidentiality for communications between client and attorney. *Cf.* R.H. Andrews & A.H. Cohn, *Ungovernability, Runaways and Truancy: An Analysis of Juvenile Court Jurisdiction 29-34* (Paper prepared for Juvenile Justice Standards Project, November 1973). The IJA-ABA Standards Relating to Noncriminal Misbehavior also abandon the once-traditional treatment of running away as predelinquent or protocriminal conduct, taking the position that running away does not involve such a threat to child or community as to justify making the runaway a ward of the court. Reliance, rather, is generally placed on assistance by voluntary agencies and less drastic forms of short-term intervention. Of course, counsel is free to—and in most cases probably should—advise the client of the risks and costs of running away, including the potential impact of such behavior on the client's relationship with his or her parents, and to urge abandonment of the plan to leave home.

#### 3.4 Advice and service with respect to anticipated unlawful conduct.

It is unprofessional conduct for a lawyer to assist a client to engage in conduct the lawyer believes to be illegal or fraudulent, except as part of a bona fide effort to determine the validity, scope, meaning or application of a law.

##### *Commentary*

The lawyer acting in juvenile court matters must, as in other cases, represent a client within the bounds of the law. Counsel may not advise a client to disobey the law or to engage in fraudulent activities. ABA, *Code of Professional Responsibility* DR 1-102, 7-102;



see ABA, *Standards Relating to the Defense Function* § 3.7 and Commentary thereto. If consulted concerning the meaning, application or validity of a statute, however, an attorney may properly express his or her professional judgment on these questions and is not barred from representing a client in a bona fide effort to determine such issues. ABA, *Code of Professional Responsibility* EC 7-4.

### 3.5 Duty to keep client informed.

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

#### *Commentary*

The lawyer's duty to keep a client involved in a juvenile court matter informed is no less important than the duty owed to adult clients. See ABA, *Standards Relating to the Defense Function* § 3.8 and Commentary. The Missouri Bar-Prentice Hall survey of what laymen and lawyers thought of the legal profession revealed that a principal source of antagonism by laymen to attorneys stemmed from perceived failure of the latter adequately and regularly to communicate with their clients. Comment, "The Attorney-Parent Relationship in the Juvenile Court," 12 *St. Louis U.L.J.* 603, 609 (1968). This is not only a matter of courtesy, although courtesy is important; it also affects the level of confidence by laymen in the administration of justice. In view of the prevailing youth and poverty of most parties to juvenile court proceedings, a substantial measure of skepticism regarding counsel's loyalty and the fairness of the adult "establishment" justice system must be anticipated. H. Freeman & H. Weihofen, *Clinical Law Training* 248, 451-52 (1972). This suspicion can only be aggravated by infrequent contact and the presentation by counsel of an apparent "fait accompli" at some point in the proceeding. Moreover, certain decisions with respect to the course of representation must ultimately be made by the client, who should therefore be advised as soon as possible of all relevant facts bearing on such decisions.

## PART IV. INITIAL STAGES OF REPRESENTATION

### 4.1 Prompt action to protect the client.

Many important rights of clients involved in juvenile court proceedings can be protected only by prompt advice and action. The

**lawyers should immediately inform clients of their rights and pursue any investigatory or procedural steps necessary to protection of their clients' interests.**

*Commentary*

As in criminal prosecutions, many important rights of respondents can be preserved only through prompt action by counsel. See ABA, *Standards Relating to the Defense Function* § 3.6 and Commentary thereto. Youthful clients stand in particular need of careful advice concerning their constitutional privileges by someone who is expressly and solely identified with their interests. The respondent "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). See *In re Gault*, 387 U.S. 1, 34-42 (1967). An attorney may not safely rely on police or probation officers to protect a client's rights at apprehension, cf. *In re Gault*, *supra* at 35-36, nor are the parents' interests always identical with those of the child. See commentary to section 3.2(a), *supra*. Moreover, although there is good reason to believe that children often do not understand in any useful way recitals of rights administered by police officers prior to custodial interrogation, see Ferguson & Douglas, "A Study of Juvenile Waiver," 7 *San Diego L. Rev.* 39 (1970), courts generally adhere to the "totality of circumstances" test in passing on waivers of constitutional rights. E.g., *People v. Lara*, 67 Cal.2d 365, 432 P.2d 202 (1967). Under this standard, waivers have been allowed even for very young children, for uneducated children, for mentally retarded children and for intoxicated children. See Lefstein, Stapleton & Teitelbaum, "In Search of Juvenile Justice: *Gault* and Its Implementation," 3 *Law & Soc. Rev.* 491, 538-39 (1969). Counsel must, therefore, promptly advise the client of all relevant rights in such a way as to make them comprehensible or, if necessary, instruct the client to remain silent until there is an opportunity to discuss the matter adequately. The same considerations apply with respect to participation in identification line-ups or, occasionally, to statements to news media. See ABA, *Standards Relating to the Defense Function* 217.

A variety of other measures must also be taken promptly to be effective. 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 or of the client's child in neglect or dependency matters can also be significant. In cases involving removal of the child from the home, immediate factual and other investigation preparatory to appearance at intake and deten-

tion proceedings is necessitated by the time limits usually placed on hearings concerning temporary custody. There may be nonlegal aspects to counsel's role at this early stage as well. The lawyer should explain, as fully as the rules of confidentiality allow, a youthful client's situation to the child's parents and the nature of future proceedings. If the child is in detention, the lawyer may also be able to facilitate visitation by the parents or, if necessary, seek to protect the client against adverse action on the part of an employer or school. See ABA, *Standards Relating to the Defense Function* 218.

#### 4.2 Interviewing the client.

(a) **The lawyer should confer with a client without delay and as often as necessary to ascertain all relevant facts and matters of defense known to the client.**

##### *Commentary*

**Necessity for Prompt Interview, Generally.** Effective representation often requires that the lawyer learn early in the proceedings a number of facts, including the charges faced by the client, the evidence supporting those charges, and the legal and social history of the client and the client's family. The client is usually the most convenient or the only source for much of this information. Counsel should, therefore, confer with the client as promptly as circumstances allow and as often as they demand. See ABA, *Standards Relating to the Defense Function* § 3.2 and Commentary. Without having done so, an attorney will be unable usefully to represent the client's interests during the intake and detention stages of the juvenile court process; in consequence, important opportunities for pretrial release or informal disposition of the case may be lost through default. The client's rights at adjudication may also be prejudiced irretrievably by such neglect. Reliance on courthouse interviews within hours or even minutes before the first judicial hearings renders virtually impossible the investigation or motions on which adequate representation often turns. As a result, the case rises or, more often, falls on the sole and unprepared testimony of the respondent. See, e.g., *West v. Louisiana*, 478 F.2d 1026 (5th Cir. 1973). Moreover, when the client appears unconvincing during this brief pretrial interview, counsel may be tempted to exert pressure on the client to admit the allegations against him or her without, of course, having investigated the factual basis for the plea. See W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 116-26 (1972).

It is also too often true that attorneys interview a client only once, irrespective of the case's apparent requirements. This may be a function of late appointment, as seemed to be true in one jurisdiction in which a single interview was held in 84 percent of the cases and not more than two were held in 98 percent of all cases handled. *Id.* at 124. There is also reason to believe, however, that some attorneys, for entirely unjustified reasons, restrict conferences with clients to the bare minimum, a practice which should sharply be condemned. See *United States v. DeCoster*, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973).

**Interviewing Youthful Clients.** Interviewing a client is often difficult and interviewing children can be unusually so. Many lawyers, it has been observed, conclude that "juvenile clients have 'poor memories,' 'don't remember,' 'don't have the social and intellectual maturity of an adult' . . ." Platt, Schechter & Tiffany, "In Defense of Youth: A Case Study of the Public Defender in Juvenile Court," 43 *Ind. L.J.* 619, 628 (1968). See also Platt & Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 *U. Pa. L. Rev.* 1156, 1181 (1968). It may be that these comments reflect an expectation that poor, minority group youths can and will remember, interpret and narrate like middle class, white adults and that an atmosphere of trust and respect will exist from the outset. If counsel approaches an interview with those expectations, frustration must commonly result. Children, and particularly children who are poor and members of a minority group, often bring suspicion and even hostility to their relationships with lawyers, which may be even more pronounced in dealings with non-minority group attorneys. See commentary to § 3.3(a), *supra*; H. Freeman & H. Weihofen, *Clinical Law Training* 242 (1972). Nor is that mistrust always one-sided. Some lawyers bring and, intentionally or unintentionally, express suspicion of or hostility toward the perceived values and manners of minority group members and young persons both minority and white. In either case, recognition of these initial barriers to communication between attorney and client is an essential precondition to their mitigation.

In addition, children perceive, interpret and describe events differently than adults; the younger the child, the greater the differences will be. It is not true to say that children are generally incapable of accurate observation. Whereas adults divide their time between observing and analyzing events, children concentrate on observation; hence, their reporting of discrete facts tends to be fairly reliable. Freeman & Weihofen, *supra* at 458. On the other hand, young chil-

dren typically have difficulty in seeing the temporal and causal relations between events. Children under eight, for example, tend to lack a sense of time; they often cannot order events chronologically or accurately judge duration. J. Piaget, *The Child's Conception of Time* 10-29, 39-49 (1927); D. Flapan, *Children's Understanding of Social Interaction* 3 (1968). Thus, a seven year old client will find it difficult to describe events in proper sequence. Moreover, children, perhaps even until they are eleven or twelve years old, often do not understand causal relationships in physical matters; they typically view events as the consequences of will or do not see intermediate steps between apparent cause and effect. See generally J. Piaget, *The Child's Conception of Physical Causality* 242-295 (1930); Flapan, *supra* at 57-63.

In addition to special problems of perception, juveniles often cannot be counted on to interpret events. Concrete rather than abstract thought is more congenial to them; further, they lack the experiential framework according to which judgments of relevance are made by adults. See generally Flapan, *supra* at 54-55; J. Rich, *Interviewing Children and Adolescents* 5, 7-8, 47 (1968). A further barrier to effective attorney-juvenile client communication exists when the client either lacks well-developed verbal skills or speaks an idiom with which the attorney is unfamiliar. Freeman & Weihofen, *supra* at 248-49; Rich, *supra* at 41, 56. Difficulty in understanding the child's narration may lead counsel to the conclusion that the client is unintelligent, intentionally rude or disingenuous when none of these is in fact true.

Lawyers conferring with young clients must, therefore, adapt their expectations and interviewing technique to the situation. The setting of the interview is initially important. Conferences in the courthouse shortly prior to appearance tend to be marked by noise, milling about and pressure; competition by social workers or probation officers for the child's attention may further produce confusion regarding the identity and affiliation of counsel. Kolker, "Representation in the Juvenile Court for the District of Columbia—Defense Counsel Manual," in *Juvenile Court Practice Institute* 6-7 (1969). Moreover, young and ghetto children are typically unused to formal, prolonged discussions with adult authority figures, and lengthy interviews may be futile and frustrating to both client and attorney. See W. Amos & J. Grambs, *Counseling the Disadvantaged Youth* 123-24 (1968). Children also tend to be highly suggestible on the one hand and highly manipulative on the other; therefore, they will often try to "read" adults in order to give what seems to be the "correct" answer to questions concerning their behavior. Freeman &

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Weihofen, *supra* at 460; Rich, *supra* at 45. Although such responses may seem dishonest to counsel, they are relatively common and intuitive reactions based on previous experience with parents, teachers and others perceived as figures of authority. In order to minimize distortions caused by the client's desire to look good, it may be desirable to interview the client alone, at least initially. Allowing the client to tell the story in his or her own words may also contribute to accuracy, although it will usually be necessary for counsel to ask a number of specific and concrete questions both to focus on relevant matters and to clarify the client's statements. Reliance on nonlegal vocabulary and sensitivity to nonverbal conduct are also useful in interviewing young clients.

4.2(b)

In interviewing a client, it is proper for the lawyer to question the credibility of the client's statements or those of any other witness. The lawyer may not, however, suggest expressly or by implication that the client or any other witness prepare or give, on oath or to the lawyer, a version of the facts which is in any respect untruthful, nor may the lawyer intimate that the client should be less than candid in revealing material facts to the attorney.

*Commentary*

It is an accepted part of interviewing practice for counsel to subject the client's statements to probing inquiry, both to test the truthfulness of those statements and to assess the client's effectiveness as a witness at trial. Such interrogation may be necessary to counteract concealment or distortion of facts occasioned by the client's embarrassment, shame, distrust or desire to say that which will help his or her cause or improve the lawyer's opinion of him or her. See H. Freeman & H. Weihofen, *Clinical Law Training* 39 (1972). It is entirely proper for an attorney to suggest that the story given is inconsistent or even incredible and to stress the importance of full and candid disclosure of all material facts and circumstances. At the same time, the lawyer's duty is "to extract the facts from the witness, not to pour them into him." H. Drinker, *Legal Ethics* 86 (1953), quoting *Matter of Eldrigge*, 82 N.Y. 161, 171 (1880). In view of the great suggestibility of youthful clients, lawyers must exercise special care to ensure that their questioning does not lead to manufacture of a more plausible or favorable, but untruthful, story. It is also improper to intimate that if a client knows incriminating information, it should be concealed so that the lawyer will be un-

inhibited in his or her examination of a witness or of the client. No valid purpose of the adversary system is served by such "calculated ignorance" of the facts; moreover, it may lead to surprise at trial or ignorance of potential lines of defense. See ABA, *Standards Relating to the Defense Function* § 3.2(b) and Commentary thereto.

#### 4.3 Investigation and preparation.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social or legal dispositional alternatives. The investigation should always include efforts to secure information in the possession of prosecution, law enforcement, education, probation and social welfare authorities. The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.

#### *Commentary*

Counsel in a juvenile court matter, as any other, is under an affirmative obligation fully and promptly to investigate all potential sources of evidence and to prepare factual and legal matters for presentation prior to and during trial. Cf. ABA, *Standards Relating to the Defense Function* § 4.1 and Commentary thereto. Neglect of adequate factual investigation has in some circumstances been held to constitute incompetent representation for sixth amendment purposes, *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Shepherd v. Hunter*, 163 F.2d 872 (10th Cir. 1947), as has failure to prepare appropriate motions or factual defenses for presentation at trial, *People v. Ibarra*, 34 Cal. Rptr. 863, 386 P.2d 487 (1963); *West v. Louisiana*, 478 F.2d 1026 (5th Cir. 1973). Handling a legal matter without adequate preparation is also ground for disciplinary action. ABA, *Code of Professional Responsibility* DR 6-101(A) (2).

This obligation obtains regardless of the client's initial statements regarding guilt or plea. Where the client denies responsibility for the acts or conditions alleged, the lawyer is under a duty to seek out sources of information bearing on the case. As a matter of course, counsel should attempt to secure all information in the possession of prosecution, law enforcement, probation and other agencies. The occasionally documented practice of relying entirely on the client's credibility, e.g., Platt, Schechter & Tiffany, "In Defense of Youth: A

Case Study of the Public Defender in Juvenile Court," 43 *Ind. L. J.* 625-26 (1968), is too patently unsatisfactory for extended comment. Juvenile court clients, at least as often as others, may for a variety of reasons distort or conceal crucial information in dealing with a lawyer. See commentary to § 6.2, *supra*. Lack of investigation in this circumstance may result in fatal surprise during trial and in failure to discover a solid factual or legal defense of which the client was unaware during conversations with counsel. If, on the other hand, the client's statements are accurate, their acceptance by the trier of fact remains a speculative proposition, and other available evidence to document these statements would be helpful. See generally E. Borchard, *Convicting the Innocent* (1932). The defense is not adequately prepared until all necessary available evidence has been located and readied for presentation.

These duties of investigation and preparation are not relieved by the client's confession of responsibility or by an expressed desire on the part of the client to admit the charges pending. Investigation may reveal facts mitigating the seriousness of the offense or reflecting favorably on the child and the child's family which can lead to informal or diversionary treatment of the matter. See Part VI, *infra*. Even if early disposition is not available, the posture at trial should not be determined on the client's uncorroborated admission. The observations of the ABA *Standards Relating to the Defense Function* in this respect are appropriate to juvenile court representation as well:

The accused's belief that he is guilty in fact may often not coincide with the elements which must be proved in order to establish guilt in law. In many criminal cases, the real issue is not whether the defendant performed the act in question but whether he had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to his intent in determining his criminal liability or responsibility. Similarly, a well-founded basis for suppression of evidence may lead to a disposition favorable to the client. The basis for evaluation of these possibilities is the lawyer's factual investigation for which the accused's own conclusions are not a substitute.

*Id.* at 226-27.

It must be said that, particularly in traditional juvenile courts which emphasize informality and dispatch in the treatment of cases, institutional and personal pressures may be exerted which, in effect, tend to discourage thorough investigation and preparation. See W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 122-125 (1972). While speed in resolution of juvenile matters is generally desirable,



it cannot justify denial of the opportunity for counsel diligently to prepare for trial. Counsel is, therefore, obligated to take all lawful steps necessary to assure that he or she can, with due promptness, satisfy a lawyer's professional responsibility in this respect.

4.3(b)

Where circumstances appear to warrant it, the lawyer should also investigate resources and services available in the community and, if appropriate, recommend them to the client and the client's family. The lawyer's responsibility in this regard is independent of the posture taken with respect to any proceeding in which the client is involved.

*Commentary*

Pretrial investigation and preparation by counsel should, where circumstances warrant, extend to medical, social, psychiatric or other resources available in the community. Participation by the client or the client's family in such programs may be an important fact in seeking pre-judicial resolution of the case; it may also be significant at adjudication even where the charges have been admitted or proved. Many juvenile court acts provide for dismissal of the petition, immediately or after a period of informal supervision, when there is no need for continuing care or treatment. *E.g.*, Ill. Rev. Stat., ch. 37, §§ 704-7 (continuance under supervision), 704-8 (dismissal); N.Y. Fam. Ct. Act § § 731, 751. Moreover, such dispositions are not always exceptional; an empirical study revealed that continuances without finding alone were ordered in 40 percent of all cases observed in one jurisdiction. W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 66-67 and Table III.1 (1972). The same study further indicates that, at least in some courts, the active participation of counsel can lead to greater invocation of that adjudicative alternative. *Ibid.* And, if an adjudication is entered, presentation of information or programs directed to the client's particular circumstances will be important at the dispositional stage. See § 9.1, *infra*.

Investigation of community services, where the need for such assistance suggests itself to counsel, should not be limited to those cases where it has some predictable use for purposes of the legal proceeding. It is an integral part of the counseling duties of an attorney, particularly one engaged in juvenile court representation, and should be undertaken even if a denial to the charges will be entered and a sound factual or legal defense exists. See § 5.4, *infra*.

4.3(c)

**It is unprofessional conduct for a lawyer to use illegal means to obtain evidence or information or to employ, instruct or encourage others to do so.**

*Commentary*

Because of the youth and poverty of the clientele, sophisticated illegal activity, such as electronic surveillance, is most unusual if not unknown in juvenile court matters. It is, nevertheless, clear that counsel may not participate in or encourage illegal gathering or fabrication of evidence or information and that counsel may not knowingly allow an employee or client to do so. ABA, *Code of Professional Responsibility* DR 1-102. See also ABA, *Standards Relating to the Defense Function* § 4.2 and Commentary thereto.

4.4 Relations with prospective witnesses.

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

*Commentary*

In general, the principles concerning relations with prospective lay and expert witnesses set forth in the ABA *Standards Relating to the Defense Function*, §§ 4.3 and 4.4, apply to counsel's conduct of juvenile cases.

**Payment of Witnesses.** Compensation of a lay witness for giving testimony is unethical, as is payment of an excessive fee to an expert for the purpose of influencing the expert's testimony. *Ibid.*; ABA, *Code of Professional Responsibility* EC 7-28. Counsel may, however, arrange for reimbursement of a witness's reasonable expenses of attendance, including transportation and loss of income, or for a reasonable fee for the professional services of an expert witness. *Code, supra* at DR 7-109(C).

**Interviewing Witnesses.** The importance of interviewing all witnesses who may have useful information concerning the matter has been emphasized in section 4.3, *supra*. A lawyer's principal obligation at this stage is to discover whether there is evidence that may assist the client; accordingly, counsel need not and perhaps should not advise prospective witnesses that the statements they give may

incriminate them. New York County Ethics Opinions, Opinion 307 (1933); ABA, *Standards Relating to the Defense Function* § 4.3(b) and Commentary thereto. The same rule should govern interviews with the parents of a client alleged to be delinquent or in need of supervision. While that interview might produce information that could, for example, lead to substitution of neglect for PINS proceedings, counsel's responsibility to the client justifies or even requires continuance of the interview without advising the parents of the use to which any disclosures may ultimately be put. It is only necessary in this situation that the lawyer avoid misleading the parents to believe their statements are protected by rules of confidentiality. See § 3.3(c), *supra*.

It should not be required, and is not in adult representation, that the lawyer disclose any affiliation with the respondent in arranging for or during discussions with prospective witnesses, except perhaps with a co-respondent or other party to the proceeding. ABA, *Standards Relating to the Defense Function* § 4.3(b) and Commentary thereto; ABA Informal Opinion 581 (1962).

In dealing with prospective witnesses, a lawyer may not obstruct communication between those witnesses and the prosecutor, nor may counsel advise a person, other than a client, to refuse to give information to the prosecutor or to counsel for a co-respondent. *Id.* at § 4.3(a); see ABA, *Code of Professional Responsibility* DR 7-109(B). It is, however, proper for counsel in good faith, to inform prospective witnesses of his or her belief that their statements may subject them to criminal responsibility and of the privilege against self-incrimination. *Id.* at § 4.3(b) and Commentary thereto. Such advice may be given even if its most apparent purpose is to discourage a person from testifying in the matter. ABA, Informal Decision 575 (1962).

**Preparation of Witnesses.** It is not only proper but important for counsel to prepare a prospective witness for examination and cross-examination at trial. While the lawyer may not seek to dictate the testimony or opinions to be offered in evidence, it is unfair as well as imprudent for a lawyer not to advise inexperienced witnesses of the questions they will be asked by both counsel for the juvenile respondent and opposing counsel. See H. Freeman & H. Weihofen, *Clinical Law Training* 467-68 (1972); ABA, *Standards Relating to the Defense Function* § 4.4(a). Expert witnesses, who frequently give critical evidence in child protective and other juvenile court proceedings, often resent vigorous cross-examination which seeks to impugn their professional qualifications and conclusions; they may

also have difficulty in phrasing medical or other inferences in legal terms. Freeman & Weihofen, *supra* at 467. The attorney must, therefore, be sufficiently prepared to understand the scientific implications of the case and to inform witnesses of the legal standards to which their testimony is directed and the challenges which may be made to their observations or conclusions.

**Use of Witness's Statements for Impeachment.** It has long been the rule that attorneys should avoid testifying on behalf of their clients. ABA, *Code of Professional Responsibility* EC 5-9 and 5-10, DR 5-102. In order to avoid this circumstance, attorneys should not interview prospective witnesses without the presence of some third person who can without embarrassment testify to any statements made during that interview. This precautionary measure is not, of course, necessary when there exists no possibility that extrinsic evidence of those statements will be material; in any doubtful case, however, a lawyer should ensure that he or she is not the only available source of evidence.

**Relations with other Parties and Prosecution Witnesses.** It is unprofessional conduct for a lawyer to communicate directly with another party known to be represented by counsel concerning the subject matter of the proceeding, unless pursuant to court order or with the consent of that party's lawyer. *Id.* at EC 7-18. See ABA, Opinion 108 (1934). This rule applies to opposing parties and to co-respondents with separate counsel alike. It may also extend to persons closely identified with the interests of a represented party, such as the parent of a co-respondent. H. Drinker, *Legal Ethics* 296 (1953). If the opposing party or co-respondent is not represented at the time when an interview is sought, no ethical bar to interviewing and taking a statement exists; lawyers must take care, however, neither to mislead unrepresented parties nor to give them legal advice. *Code, supra* at EC 7-18; ABA, Informal Opinion 908 (1966).

With the exception of other parties, a lawyer may interview prospective witnesses, whether represented or not, without prior consent. And, in criminal cases, witnesses to be called by the prosecution at trial, including the victim or complaining witness, are not treated as clients of the prosecution. Defense counsel, therefore, not only may but ordinarily should interview them, with or without notice to or the consent of the prosecuting attorney. See ABA, *Canons of Professional Ethics*, Canon 39; ABA, Opinion 101 (1933). That the witness is under subpoena is immaterial for this purpose.

Drinker, *supra* at 85 (1953); ABA, Opinion 127 (1935). Of course, the lawyer in interviewing any witness must scrupulously avoid any suggestion calculated to induce suppression of or deviation from the truth. ABA, *Canons of Professional Ethics*, Canon 39. ABA, *Code of Professional Responsibility* DR 7-109(A) and EC 7-28. The same rules are appropriate to juvenile representation.

## PART V. ADVISING AND COUNSELING THE CLIENT

### 5.1 Advising the client concerning the case.

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

#### *Commentary*

Among the most obvious tasks of counsel is to advise the client concerning all aspects of the case, including its probable outcome. ABA, *Standards Relating to the Defense Function* § 5.1. Counsel should be fully informed concerning the facts and applicable law before giving the client an evaluation of the case; hip-pocket analysis presents the risks both of self-fulfilling prophecy and of unnecessary surprise to the client. *People v. Ibarra*, 34 Cal. Rptr. 863, 386 P.2d 487 (1963); ABA, *Canons of Professional Ethics*, Canon 8; H. Drinker, *Legal Ethics* 102 (1953).

The lawyer in advising the client with regard to the merits and outcome of the case must be both candid and prudent. On the one hand, overoptimistic or unqualified evaluations should be avoided. No matter how good a case may appear at this point, experienced counsel are aware that witnesses may fail to attend or alter their testimony, apparently credible evidence may not be so persuasive at trial or to the trier of fact, and the law may be interpreted differently than the attorney expects. See ABA, *Canons, supra* at Canon 8. While assurances of success might temporarily relieve anxiety, the client and the client's family may interpret an unexpected result as

a manifestation of prejudice or other unfairness in the administration of juvenile justice. This perception can in turn adversely affect cooperation in the dispositional arrangement ordered by the court. Such harm both to the client and to the court should be avoided so far as possible.

On the other hand, it is unprofessional conduct for an attorney intentionally to overstate or understate the risks, hazards or prospects of the case in order to influence the client's posture in the matter. Misrepresentation by attorneys of the prospects of a case in order to obtain employment for themselves or to charge higher fees has always been held unprofessional conduct, for which disciplinary action is demanded. *E.g.*, *State Board of Law Examiners v. Shelton*, 43 Wyo. 522, 7 P.2d 226 (1932); *United States v. Stringer*, 124 F. Supp. 705 (D. Alaska 1954); ABA, *Standards Relating to the Defense Function* § 5.1(b) and Commentary thereto. Knowing exaggeration of the risks of the case in order to coerce the respondent into entering an admission, either because of the lawyer's view of the client's "best interest" or for reasons of professional or personal convenience, is equally improper. The plea decision is ultimately for the client, see §§ 3.1(b), *supra* and 5.2, *infra*, and it is unprofessional conduct for counsel to practice fraud on the client as a means of usurping that responsibility.

5.1(b)

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

*Commentary*

Juvenile court clients and their families should be advised of the legal limits imposed on communication with prospective witnesses. See ABA, *Canons of Professional Ethics*, Canon 16; ABA, *Standards Relating to the Defense Function* § 5.1(c) and Commentary thereto. Particularly where the witnesses against a juvenile client are neighbors or schoolmates, counsel should make clear that offers by the client to "make it up," threats or other efforts to affect a witness's testimony are wrongful and may result in additional legal proceedings. In some circumstances—as where the client's parent is also the

complaining witness—such cautionary advice will be of little real effect; nevertheless, the lawyer should at least inform the client of the prevailing rules of law.

In those jurisdictions where jury trial is available in juvenile court cases, the rules generally governing relations with jurors in adult cases apply. The child and the parents should be advised that even casual communication with a juror, before or during trial, or with a prospective juror, is a grave impropriety and to so conduct themselves as to avoid even the semblance of such impropriety. ABA, *Standards Relating to the Defense Function* § 5.1(c) and Commentary.

#### 5.2 Control and direction of the case.

(a) Certain decisions relating to the conduct of the case are in most cases ultimately for the client and others are ultimately for the lawyer. The client, after full consultation with counsel, is ordinarily responsible for determining:

- (i) the plea to be entered at adjudication;
- (ii) whether to cooperate in consent judgment or early disposition plans;
- (iii) whether to be tried as a juvenile or an adult, where the client has that choice;
- (iv) whether to waive jury trial;
- (v) whether to testify on his or her own behalf.

#### *Commentary*

It has long been recognized in civil and criminal matters that responsibility for control and direction of the case must be allocated between attorney and client. See ABA, *Standards Relating to the Defense Function* § 5.2; ABA, *Code of Professional Responsibility* EC 7-7, 7-8; see ABA, Informal Opinion C-455 (1961). It has been suggested, for a variety of reasons, that this allocation is inappropriate to juvenile court representation. The “nonadversarial” nature of the proceedings, the “incompetence” of the child to decide basic questions concerning conduct of the case or the social consequences thought to be associated with “wrong” choices by the child have all been advanced to justify increased decisional authority on counsel’s part. The reasons for rejecting these views with respect to plea determination have been set forth in the Introduction and the commentary to section 3.1(b), and largely apply to the other decisions placed with the client by this standard.

**Cooperation in Consent Judgment or Early Disposition Plan.** Informal or diversionary treatment of a juvenile court matter is, in many cases, the resolution most advantageous to the client. At the same time, such disposition may involve admission of some or all of the charges against the respondent and greater or lesser restriction of the juvenile's liberty. Submission to a consent judgment or participation in an early disposition plan is, for all present purposes, equivalent to approval of a plea bargain or civil settlement offer, which decisions are always reserved for the client. Plea negotiations: ABA, *Standards Relating to the Defense Function* §§ 5.2, 6.1; *Taylor v. State*, 287 So.2d 901 (Ala. 1973); civil settlements: ABA, *Code of Professional Responsibility* EC 7-7; ABA, Informal Opinion C-455 (1961). Even though counsel may be persuaded that a proposed plan for informal treatment is in the client's interests, the attorney's function is limited to full disclosure of the material considerations and a recommended course of action. Lawyers may not ordinarily accept responsibility for admitting allegations against their clients nor submit their clients involuntarily to limitations on their liberty. For an example of this principle, see W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 132 (1972).

**Transfer of Jurisdiction.** In some jurisdictions the respondent is entitled to elect trial as an adult in place of treatment under the juvenile court act. *E.g.*, Ill. Rev. Stat. ch. 37, § 702-7. Whether to exercise that option is not merely a matter of trial strategy; in any instance where transfer is attractive there are substantive considerations in both directions. A juvenile probationer, for example, may expect a less severe disposition for conviction of a petty misdemeanor if tried as an adult than from the juvenile court. *Cf.*, *In re Gault*, 387 U.S. 1 (1967) (respondent indefinitely committed to industrial school for offense carrying maximum criminal punishment of a fine of \$50 or imprisonment not to exceed two months). At the same time, adult criminal records are not subject to the various secrecy and sealing provisions of juvenile court laws, and the stigma associated with conviction may be an important consideration. Although counsel may form strong views concerning the relative wisdom of one course or the other and should fully advise the client regarding all potential advantages or disadvantages of transfer, the election of forum is indistinguishable in principle from decisions regarding plea or early disposition and is ultimately for the client to make.



**Jury Trial.** It is clear in adult cases that election or waiver of trial by jury is the responsibility of the client after full consultation with counsel. ABA, *Standards Relating to the Defense Function* § 5.2 and Commentary thereto; *Commonwealth v. Stokes*, 299 A.2d 272 (Pa. 1973). There is no persuasive reason why this principle should not apply in jurisdictions which make jury trials available in juvenile matters.

**Testifying at Trial.** It is for criminal defendants to choose whether to testify in their own behalf. ABA, *Standards Relating to the Defense Function*, *supra* at § 5.2 and Commentary thereto; *People v. Brown*, 54 Ill.2d 21, 294 N.E.2d 285 (1973). Indeed, experienced and careful attorneys often take some care to assure that their clients frankly assume that responsibility and not pass it off on counsel. See E. Marjoribanks, *For the Defence: The Life of Sir Edward Marshall Hall* 330-31 (1929). In juvenile matters, on the other hand, it is sometimes suggested that "decisions as to whether or not to invoke the privilege against self-incrimination must be made in a broader and different perspective than that normally employed in adult criminal matters. . . ." Isaacs, "The Lawyer in the Juvenile Court," 10 *Crim. L. Q.* 222, 234 (1968). The lawyer may, in this view, waive the child's privilege on grounds of "social desirability," though only with great care. *Ibid.* See also Coxe, "Lawyers in Juvenile Court," 13 *Crime and Delinq.* 488, 490 (1967).

This modified construction of the child's privilege finds no adequate justification in either the tradition of the privilege itself or in the principles that generally inform these standards. So far as the first is concerned, the privilege against self-incrimination has uniformly been considered personal to the accused and not subject to waiver or exercise by another on the holder's behalf. 8 J. Wigmore, *Evidence* §§ 2196, 2270 (McNaughton Rev. 1961). To the extent that alteration of the traditional rule is based on social concerns such as belief that confession is a therapeutic process, it is enough to recall that *Gault* expressly considered and found insubstantial a similar view when it extended the privilege to delinquency matters. *In re Gault*, 387 U.S. 1, 51, 55 (1967). The Court held the privilege "applicable in the case of juveniles as it is with respect to adults," without limitation to "socially desirable" cases. *Id.* at 55. Finally, most children are probably as capable as most adults of understanding the potential risks and advantages associated with taking the stand or declining to do so. The respondent is not in the position of an uncounseled youth at the police station or in court; by hypothesis, he

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or she has the benefit of legal assistance and a thorough explanation of the available alternatives and their implications. The decision whether to participate testimonially is no more abstract or complex than others reserved for the client under this standard and section 3.1(b).

In those cases where the child is too young rationally to make these choices, the rules set forth in section 3.1(b) (ii) should govern determinations that are ordinarily the client's responsibility.

**Consultation with Counsel.** It is explicit in the foregoing discussion that the lawyer should clearly inform the client of all considerations relevant to the client's decision. Counsel's advice may properly extend to the known practices and opinions of the court concerning exercise of a privilege or option. For example, although such an attitude is regrettable and violative of constitutional principles, some judges and other court personnel adversely view invocation of the privilege against self-incrimination. Counsel may from past experience, therefore, reasonably apprehend a nonlegal disadvantage flowing from maintaining silence. See Stapleton & Teitelbaum, *supra* at 130-31. The lawyer should bring both the legal privilege and the perceived consequences of its exercise to the client's attention. See ABA, *Code of Professional Responsibility* EC 7-8.

In advising and counseling a client concerning matters the latter must decide, however, the attorney must exercise care not to assume covertly responsibilities which are the client's. H. Freeman & H. Weihofen, *Clinical Law Training* 454 (1972). It is common knowledge that lawyers can by their education, verbal skills and authoritative position effectively dictate the direction of their clients' choices. Sometimes this is done blatantly. One study describes the following strategy of client control:

These attorneys agree that there is no sense in fighting a case when the child admits the activity unless the proposed disposition is commitment. There are various means used to persuade clients not to contest cases. One attorney informed the child's mother that if she wanted to contest the case, he would request a jury trial and his fee would be significantly higher.

T. Murto, *To Defend the Child* 41 (Manuscript, University of Texas Law School, 1971). Practices of this sort deserve strong condemnation and professional sanction. Even the attorney who genuinely wishes

to defer to the client must avoid presenting the alternatives in such a way that real choice is effectively precluded. Freeman & Weihofen, *supra* at 456. The risk of overreaching, consciously or unconsciously, is particularly acute with young, poor and uneducated clients and for lawyers who are specially concerned with continuing comfortable relations with judicial and nonjudicial agencies. See commentary to § 3.1(a), *supra*.

5.2(b)

Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what jurors to accept and strike, what trial motions should be made, and any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client, are the exclusive province of the lawyer after full consultation with the client.

*Commentary*

Most educated adults are incapable of conducting their own defense with technical skill and sound tactical judgment; children are presumably under an even greater handicap in this respect. They cannot be expected to cross-examine witnesses or determine the materiality of evidence generally. See President's Commission on Law Enforcement and Administration of Criminal Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 32 (1967); Schinitzky, "The Role of the Lawyer in Children's Court," 17 *Record of A.B.C.N.Y.* 10, 15 (1962). Accordingly, responsibility for decisions regarding trial strategy are properly allocated to counsel, to the extent that they do not conflict with determinations reserved for and made by the client under section 5.2(a), above. See ABA, *Standards Relating to the Defense Function* § 5.2 and Commentary thereto; *United States ex rel. Sabella v. Folette*, 432 F.2d 572 (2nd Cir. 1970); *Commonwealth v. Battle*, 310 A.2d 362 (Super. Ct. Pa. 1973).

5.2(c)

If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his or her advice and reasons, and the conclusion reached. This record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

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*Commentary*

Decisions of the kinds described in sections 5.2(a) and (b) frequently become the subject of postconviction proceedings attacking the effectiveness of representation at trial. ABA, *Standards Relating to the Defense Function* § 5.2(c) and Commentary. As a matter of fairness to both counsel and client, a written record of the nature of the disagreement concerning such decisions, the lawyer's reasons for his or her view, and the course followed should be made promptly, while the matter is fresh in the attorney's mind. This memorandum or other record should be made available and fully explained to the client and, if their interests are not adverse, to the client's parents.

**5.3 Counseling.**

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

*Commentary*

Parties to juvenile court matters almost by definition are apt to suffer family disruption of some kind. Many delinquency, most supervision and virtually all child protective proceedings involve at least alleged intrafamilial difficulty. Either because the problem is expressly raised by the client or by virtue of the circumstances giving rise to representation, the attorney is peculiarly well placed to discuss these matters with the client. In certain cases, counseling may ultimately avoid institution of formal legal proceedings which might exacerbate rather than resolve parent-child disputes. See H. Freeman & H. Weihofen, *Clinical Law Training* 287-291 (1972). In other instances, neutral presentation of each view may be of value to clients and their families. Interpretation by counsel can also be of value where the parents have no part in the legal proceedings. They may be inclined to accept the child's wrongdoing on the theory that "where there's smoke, there's fire," and the attorney's explanation of the child's story, corroborated by the attorney's own investigation, may put a different complexion on the child's behavior.

Even in a "routine" case, an experienced lawyer may be able to recognize a need for nonlegal professional assistance. As Freeman &

Weihofen observe, "If wife-beating was caused by alcoholism, burglary by the need to support a drug habit, or arson or shop-lifting by pyromania or kleptomania, or if rape was impelled by a need to prove manhood or to disprove homosexuality, the lawyer may be able to arrange for his client's admission to a treatment program." *Id.* at 245-46. With children, truancy, school behavioral problems and other forms of misconduct may be related to learning difficulties. Despite contrary assertions, there is substantial evidence that academic achievement is causally related to delinquency, at least by way of success in and attachment to school. T. Hirschi, *Causes of Delinquency* 110-134 (1969). Difficulties within and without school may also be emotional manifestations of physical problems; for example, a child with a severely disfiguring scar on his head who suffers vicious teasing from his schoolmates may avoid attending school because of this physical problem. See W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 173 (1972). Hearing and visual handicaps often produce the same effect.

Success in recognizing the need for expert evaluation or treatment of a client may have substantial significance for handling of the client's case at intake and detention and, if allowed, for plea bargaining. Moreover, discovery of mental illness may be dispositive of transfer or adjudicatory proceedings, *Kent v. United States*, 401 F.2d 408 (D.C. Cir. 1968); *In re Winburn*, 145 N.W.2d 178 (Wis. 1966), and its relevance at disposition is obvious. See *In re State in the Interest of H.C.*, 106 N.J. Super. 583, 256 A.2d 322 (1969); *In re P.*, 34 A.D.2d 661, 310 N.Y.S.2d 125 (1970). Quite apart from specific negotiation or litigation purposes, however, identification and referral of psychiatric, perceptual or physical difficulty should be viewed as an appropriate and important aspect of counsel's role. In one sense, the best of both worlds is accomplished when the lawyer helps the client avoid a finding of delinquency and, at the same time, assists in arranging a course of treatment that will help to alleviate the client's behavioral or other problems or provides at least a temporary bridge between parent and child. In this way—and sometimes only in this way—can a lawyer fully discharge both advocacy and counseling functions.

It will be appreciated that performance of the role described above may involve expertise or at least sensitivity beyond that reflected in what has sometimes passed for counseling—i.e., the delivery of lectures on right thinking and behavior. Some lawyers, it has been observed,

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see it as part of their duty as adults and public officials to sit down and talk with juveniles "on their own level," to impress them with the importance of telling the truth, to frighten them away from committing similar acts in the future, and to "reinforce to the child what the judge has said." The juvenile client is in turn expected to show penitence and gratitude. . . . The proper response is sometimes reinforced by reference to cultural or family responsibility. "If the child is a Negro," said a white attorney, "and if he is bright and good in school, I tell him that he has an opportunity to help his race and his family which he ought to use instead of messing up."

Platt & Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 *U. Pa. L. Rev.* 1156, 1180 (1968). The denial of the child's integrity and personality revealed by this and similar techniques (*e.g.*, "If I were you . . .") can only generate resentment and undermine any real prospects for counseling. See Freeman & Weihofen, *supra* at 249; W. Amos & J. Grambs, *Counseling the Disadvantaged Youth* 113, 153 (1968). To be effective, all counselors—including attorneys—must appreciate their clients' circumstances rather than seek to impose their own framework on clients. As with interviewing, patience is required. See § 4.2, *supra*. Lawyers should not assume that they will be perceived as helping figures nor that clients are naturally introspective or psychologically oriented. Children, and especially minority group youth, are often initially unfamiliar with the verbal and introspective demands characteristic of the counseling relationship and may, consequently, appear less acute and cooperative than they would be in more familiar situations. See Amos & Grambs, *supra* at 163; J. Rich, *Interviewing Children and Adolescents* 27 (1968). Nor should counsel expect a hypodermic model of the counseling enterprise; an input of "good suggestions" by the attorney, even if accompanied by contemporaneous verbal acceptance on the client's part, does not necessarily imply that the attorney's anticipations will be realized. Poor children, particularly when talking with adults, tend to verbalize middle class goals or values because that appears to be the only acceptable response, without having in some cases the same internal commitment to those goals and in many cases the same opportunity to achieve those goals possessed by adults or middle class children. By the same token, the attorney should not immediately conclude from the client's failure to follow that advice that the latter is a pathological liar, or deviant. Discontinuity between verbal expression and behavior should not automatically be associated with pathology; rather it may serve as a functional and adaptive response to prevailing socioeconomic facts of life. See Amos & Grambs, *supra*

at 165. On the other hand, the attorney should be sufficiently familiar with those facts to recognize manipulative behavior on the client's part and react appropriately to it. See Boston Court Resource Project, *The Selection and Training of Advocates and Screeners for a Pre-Trial Diversion Program* 41-43 (1972).

Doubtless, the willingness and capacity of lawyers to engage in adequate counseling varies widely. Particularly in offices that engage in substantial juvenile court practice, resources should be available for employing personnel who are trained and experienced in interviewing and counseling. If the counseling function is taken as seriously as it deserves, providing services of this kind is not less important than traditional investigatory resources. See § 2.1(c), *supra*, dealing with supporting services. In some jurisdictions, supporting services operated by the public defender agency may generally be available to members of the bar. See Institute for Criminal Law and Procedure, *Rehabilitative Planning Services for the Criminal Defense: An Evaluation of the Offender Rehabilitation Project of the Legal Aid Agency for the District of Columbia* (1969). Where this is true, lawyers without experience or inclination to counsel their clients should be encouraged to use or refer to such agencies.

## PART VI. INTAKE, EARLY DISPOSITION AND DETENTION

### 6.1 Intake and early disposition, generally.

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

#### *Commentary*

Various mechanisms for disposing of cases short of trial are widely utilized throughout civil and criminal justice systems. Generally, these devices serve to resolve matters in which there is no substantial disagreement as to legal or factual propositions or where formal processes for dispute resolution appear too costly or drastic in view of the behavior involved. See generally NIMH, *Diversion from the Criminal Justice System* (1971); R. Nimmer, *Diversion: The Search for Alternative Forms of Prosecution* (1974).

Diversion from official treatment, even after police officers have

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exercised their discretion in the field, has received special emphasis in the juvenile justice system. As the President's Commission on Law Enforcement and Administration of Justice observed:

[A] great deal of juvenile misbehavior should be dealt with through alternatives to adjudication, in accordance with an explicit policy to divert juvenile offenders from formal adjudication and authoritative disposition to non-judicial institutions for guidance and other services. . . . The preference for non-judicial disposition should be enunciated, publicized, and consistently espoused by the several social institutions responsible for controlling and preventing delinquency.

President's Commission on Law Enforcement and Administration of Criminal Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 16 (1967). This preference for unofficial or nonjudicial disposition of juveniles reflects the conviction that too many children are processed by courts, that many of these referrals are unnecessary and that in many cases the harm done to children by such treatment far outweighs any benefits gained from that experience. Specifically, it is believed that exposure to court processes in many instances contributes to or exacerbates rather than alleviates the problem of delinquency. E. Lemert, *Instead of Court: Diversion in Juvenile Justice* 1 (1971).

Virtually every state now has adopted an "intake" or "preliminary inquiry" procedure under which court officers determine whether complaints require formal judicial treatment or may more appropriately be handled by informal measures. Ferster, Courtless & Snethen, "Separating Official and Unofficial Delinquents: Juvenile Court Intake," 55 *Iowa L. Rev.* 864, 866 (1970). It is a measure of the significance of pre-judicial disposition that in some jurisdictions 80-90 percent of all complaints to court have been diverted from formal processing and that, nationally, some 53 percent of all cases referred to juvenile courts for processing were treated by informal measures. U.S. Children's Bureau, *Juvenile Court Statistics* 11, 15-20 (1967). While not every court has in fact established an intake department, the trend is strongly in that direction. See Ralston, "Intake: Informal Disposition or Adversary Proceeding," 17 *Crime & Delinq.* 160 (1971).

In addition to its institutional importance, diversion procedures involve important consequences for the respondent. On the one hand, a decision not to proceed formally with the matter will largely spare the respondent from imposition of a harmful social label, the possibility of commitment to official probation or an institution,



and the various other costs associated with full adjudicative and dispositional proceedings. On the other hand, "informal" diversion or nonjudicial disposition often involves more than the exercise of grace. For some time, the practice of "informal probation" has been used by probation staffs, through which supervision and, perhaps, treatment has been provided for a child against whom a complaint has been made but who has not been referred to court. See Ferster, Courtless & Snethen, *supra* at 866-67, 893. In addition, intake departments increasingly employ "consent judgments" as a device for semiofficial treatment. Typically, this mechanism involves the filing of a formal petition, entrance into a stipulation of involvement approved by the court and agreement by the child to various terms or conditions of supervision for a period of time. *E.g.*, N.M.S.A. § 13-14-33 (Supp. 1972). See generally Gough, "Consent Decrees and Informal Service in the Juvenile Court: Excursions Toward Balance," 19 *Kan. L. Rev.* 733 (1971). Under either of these alternatives, the respondent is subject to restrictions on his or her liberty closely approximating those customarily imposed pursuant to formal probation although, of course, no adjudication of delinquency has been entered.

In most jurisdictions, these steps are taken without the participation of counsel. Ferster, Courtless & Snethen, *supra* at 888-89; Rosenheim & Skoler, "The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings," 11 *Crime & Delinq.* 167, 173 (1965); New York Legal Aid Society, *Manual for New Attorneys* 22 (1971). Several reasons for this circumstance exist. Many statutes do not provide for legal representation at this stage and, even where provision is made, lawyers are neither requested nor routinely appointed prior to the first judicial hearing. Dyson & Dyson "Family Courts in the United States" 9 *J. Fam. L.* 1, 5-6 (1969). It is also true that some lawyers believe participation at intake to be uneconomical and unproductive.

Considering the importance of intake and early disposition, however, it is most desirable that legal counsel be available and prepared to assume as active a role as circumstances permit at that early stage. See NCCD, *Model Rules for Juvenile Courts*, Rule 3; NCCD, *Provision of Counsel in Juvenile Court Proceedings* 9, 21 (1970); Gough, *supra* at 737. The IJA-ABA Juvenile Justice Standards Project *Standards Relating to Pretrial Court Procedures* take this view in providing for a nonwaivable right to counsel at intake for delinquency and supervision matters. The range of activities open to an attorney will depend, of course, on a number of circumstances, including whether the child is in detention and the point at which counsel

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enters the case. A variety of services that lawyers can usefully perform for their clients during pre-judicial stages can, nevertheless, be identified and may be feasible in any given case:

1. Counsel can speak to the legal sufficiency of the complaint and of the available evidence. Children and their parents may not know, for example, that the crime of "verbal assault" does not exist. See Rosenheim & Skoler, *supra* at 170.
2. Counsel can and should investigate the availability of and present for consideration community services to which the respondent can be referred in place of formal judicial treatment. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court," 12 *Buff. L. Rev.* 501 (1963).
3. Counsel can explain to the child and his or her parents the child's situation so that if, for example, the possibility of nonjudicial adjustment exists, they will understand and be prepared to decide whether that disposition, and any conditions involved in it, are acceptable. Rosenheim & Skoler, *supra* at 170.
4. Counsel can study the case against the child, and decide what lines of investigation are required for preparation of an adequate defense, if one is to be raised. *Id.*
5. If the child is in detention, counsel can seek alternatives to continued detention and present these to the intake department. *Id.*

There is good reason to expect that legal participation of the kind just described can effectively promote the respondent's interests and, concomitantly, the avowed purposes served by intake screening generally. The preliminary inquiry, in seeking to find nonjudicial alternatives, epitomizes the beneficial aspects of the juvenile court system. To the extent that carefully prepared attorneys can, with the informed agreement of their clients, facilitate that process, obvious advantages may be expected. And, to the extent that abuses of intake discretion exist, legal scrutiny of the process is necessary both to protect the respondent and to guarantee the proper operation of the preliminary inquiry.

#### 6.2 Intake hearings.

(a) In jurisdictions where intake hearings are held prior to reference of a juvenile court matter for judicial proceedings, the lawyer should be familiar with and explain to the client and, if the client is a minor, to the client's parents, the nature of the hearing, the procedures to be followed, the several dispositions available and their probable consequences. The lawyer should further advise the client of his or her rights at the intake hearing, including the privilege

**against self-incrimination where appropriate, and of the use that may be made of the client's statements.**

*Commentary*

It is impossible to generalize concerning present intake rules and practice. There are wide differences concerning responsible personnel, functions, criteria, procedures and alternatives. The burden is, therefore, on counsel to become familiar with the staff and scope of authority available to and exercised by intake departments, together with the procedures according to which such decisions are to be made. Equally important, counsel must also be familiar with the reasonably available alternatives to formal treatment of the case, including community services available on a voluntary basis. Without such information the attorney will not be able to prepare a plan for informal disposition which may promote the clients' interests both by avoiding formal treatment and by providing needed nonlegal services to the client and the client's family.

The various aspects of pre-judicial processing will, in all likelihood, seem mysterious and confusing to clients and to their parents. The lawyer should, therefore, at the earliest opportunity fully advise the client and, where appropriate, the client's parent concerning the nature of the preliminary hearing, the results that may follow it and the consequences associated with the various available dispositions. As a general rule, appearance by the parties at intake is a voluntary matter, N.M.S.A. § 13-14-14(B); N.Y. Fam. Ct. Act, § 734 (d), 1033(c); Ill. Rev. Stat. ch. 37, § 703-8(4); U.S. Children's Bureau, *Legislative Guide for Drafting Family and Juvenile Court Acts* § 13(d). Counsel should, however, point out that nonattendance may appear to reflect lack of concern which, in turn, can be expected to lead to formal treatment of the case. In this respect, the lawyer should particularly emphasize the significance that a genuine display of parental interest may properly carry in deciding whether the family can be relied on to resolve any problems the respondent's behavior seems to manifest. It is also important that client and parents are prepared for the distinctively social aspect of the preliminary inquiry and for the personal questions that will likely be asked.

The lawyer must also advise the client of the various legal consequences that may attend participation in the preliminary inquiry. Frequently, a dilemma of some dimensions is presented; candor is usually important to informal treatment, but—regrettably—in some jurisdictions statements made during this stage are admissible against the client in subsequent judicial proceedings. Accordingly, the cli-

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ent should be advised of his or her privilege against self-incrimination and of the use to which statements at intake may be put. See Ferster, Courtless & Snethen, "Separating Official and Unofficial Delinquents: Juvenile Court Intake, 55 *Iowa L. Rev.* 864, 890-91 (1970). In the other direction, the client (and the parents) should be informed of the possibility and nature of nonjudicial disposition, so that—if such a result becomes available—they will be prepared to decide whether that disposition and any conditions attached to it are acceptable.

6.2(b)

The lawyer should be prepared to make to the intake hearing officer arguments concerning the jurisdictional sufficiency of the allegations made and to present facts and circumstances relating to the occurrence of and the client's responsibility for the acts or conditions charged or to the necessity for official treatment of the matter.

*Commentary*

In addition to the counseling function described in section 6.2(a), counsel may appropriately act as an advocate for the client within the existing intake scheme. At least formally, intake departments are often charged with passing on the legal sufficiency of the complaint, and decisions to close a case for insufficiency are not unknown. Ferster, Courtless & Snethen, "Separating Official and Unofficial Delinquents: Juvenile Court Intake, 55 *Iowa L. Rev.* 864, 869-70 (1970). If, as sometimes happens, the allegations of delinquency really involve "verbal assault" or riding in a stolen car without knowledge of its stolen quality, a lawyer is far better prepared than a client to point up lack of jurisdictional basis for court action. Similarly, counsel should, if time allows, seek to determine whether there is any credible evidence to support the charges and present that circumstance to the responsible official. In discharging these duties, counsel should accommodate his or her manner of presentation to the generally informal and non-contentious nature of the intake process, having regard to the specific issues presented at this stage under formal rules and in practice.

While the raising of legal questions on a clients' behalf is surely appropriate to counsel's function at intake, more typically advocacy at this early stage of the proceeding will be nonlegal in character. One survey of cases closed at intake revealed that lack of evidence was rarely given as the reason for such action (3.6 percent of cases sampled); the most frequent bases for informal treatment of resident juveniles were apparent ability of the family to cope with the problem, the child's freedom from involvement in further difficulty since

referral and the rendition of services to the child by another agency in the community. *Id.* at 881-82. Accordingly, the attorney should be ready to present any facts or circumstances tending to show that drastic intervention is not demanded. The attorney must, therefore, be as familiar as possible with the child's relationships within the family, with his or her peers and at school, the child's previous experiences with judicial and community agencies, and any other matters relating to the need for continuing supervision of the child. Inquiry of this sort will commonly provide intake officers with greater information than they would ordinarily have available since, for reasons of privacy or because of limited resources, preliminary investigation is often limited to consideration of immediately available records and statements which may be affirmatively misleading or, because of incompleteness, lead to an erroneous assessment of the child's or family's circumstances. See R. Boches & J. Goldfarb, *California Juvenile Court Practice* 57 (1968).

These activities, it should be stressed, are no more extraneous to performance of the lawyer's professional duty than those substantially similar services routinely rendered by lawyers engaged in commercial and corporate representation. Advocacy includes seeking for the client the best result available under the circumstances, which in this instance involves resort to nonlegal services in order to avoid legal proceedings. When successful, counsel's efforts may produce a saving in judicial time and a saving to the client in preventing the social disadvantage of a formal adjudication of delinquency, which may in turn prevent the development of a "delinquent self-concept" on the latter's part. To restrict the definition of counsel's function to argument before a court would be artificially and undesirably restrictive.

### 6.3 Early disposition.

(a) When the client admits the acts or conditions alleged in the juvenile court proceeding and, after investigation, the lawyer is satisfied that the admission is factually supported and that the court would have jurisdiction to act, the lawyer should, with the client's consent, consider developing or cooperating in the development of a plan for informal or voluntary adjustment of the case.

#### *Commentary*

Even when a case cannot be closed at intake, diversionary treatment may still be available and appropriate. The lawyer should investigate community resources with a view toward developing and,

with the client's consent, presenting a plan for referral to such services in place of judicial treatment. See § 6.1, *supra*. Alternatively, some form of "informal probation" administered through the intake department may be a desirable resolution of the matter. Finally, a consent judgment—which ordinarily involves judicial participation but not a finding of delinquency—may be sought. Counsel will in many instances be able to rely on the efforts of a probation officer or intake worker in locating such a program; occasionally, counsel will be required to assume entire responsibility for that effort. In either case, the lawyer must be familiar not only with existing community agencies but with their actual capacity to provide assistance to the client and, perhaps, to the client's family.

The decision whether to accept early disposition or any conditions associated with it is, finally, for the client. § 5.2, *supra*. Whenever it is feasible, therefore, counsel should seek the client's consent before entering into discussions or preparations related to diversionary resolution of the case. In seeking such consent, the attorney should fully explain the nature of informal or early disposition plans, the conditions which may be attached to it, and the probable consequences of participation or refusal to participate in voluntary adjustment.

#### 6.3(b)

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

#### *Commentary*

In many jurisdictions, eligibility for early disposition or consent judgment requires an admission of responsibility by the respondent. See generally Gough, "Consent Decrees and Informal Service in the Juvenile Court: Excursions Toward Balance," 19 *Kan. L. Rev.* 733 (1971). When the client denies involvement but sees clear benefit to an informal disposition or consent judgment, counsel will inevitably be placed in the same position as when the respondent desires to enter a judicial plea of guilty while privately claiming innocence. Under this standard an attorney should refuse to participate in such an admission at this stage. To do so may lead to unjustified restrictions of liberty and, perhaps, of family disruption. A practice with these consequences and which may, in addition, have some tendency to impeach the legitimacy of the justice system should be avoided.

*Cf.* National Advisory Commission on Criminal Justice Standards and Goals, *Courts* 62 (1973).

Admittedly, the position taken here is not free from disadvantage or difficulty. As a practical matter, it means that children will sometimes be required to undergo formal proceedings and risk severe consequences because they maintain their innocence. The proper cure for this may lie, though, in a more flexible approach to early disposition through increased use of diversion rather than in permitting the equivalent of so-called "Alford" pleas.\*

The standards are consistent in rejecting "Alford" pleas for juveniles (see *Prosecution* Standard 5.2, *Adjudication* Standard 3.5) on the ground of the greater susceptibility of juveniles to the influence of persons in positions of authority.

Though this standard may appear to deviate from section 3.1(i), *supra*, which states that the client is ultimately responsible for the plea to be entered, the factors discussed above are of sufficient importance to override the general policy of these standards.

Moreover, where intake or court rules prohibit accepting a plea from or taking other types of action against one who denies guilt in fact the client's instructions in a sense are not lawful and cannot bind the attorney. See ABA, *Code of Professional Responsibility* DR 7-101(A) and 7-102(A), which requires a lawyer to seek "lawful objectives of a client."

#### 6.4 Detention.

(a) If the client is detained or the client's child is held in shelter care, the lawyer should immediately consider all steps that may in good faith be taken to secure the child's release from custody.

#### *Commentary*

It sometimes happens, particularly where "serious" misconduct is thought to be involved, that a child will be removed from the home and temporarily placed in official custody pending resolution of the matter. The term "detention" is customarily used to connote place-

\*An "Alford" plea is one where a defendant, though maintaining his or her innocence, voluntarily and knowingly pleads guilty to a lesser offense than that with which the defendant was originally charged, in the belief that such a plea is in his or her best interest. See *North Carolina v. Alford*, 400 U.S. 25 (1970), where the Supreme Court held that a court may accept such a plea, even though a defendant claims innocence, as long as the court is satisfied that the plea is knowingly and voluntarily given, and that there is satisfactory evidence on the record before the judge of actual guilt.

ment of children allegedly delinquent or in need of supervision in secure custody pending juvenile court disposition; "shelter care" refers to the temporary custody of children in more or less open facilities, including boarding and receiving homes. Shelter care is usually appropriate for children believed neglected or dependent, but may also be used for children charged with delinquency or in need of supervision who require removal from the home but not secure custody. Rosenheim & Skoler, "The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings," 11 *Crime & Delinq.* 167, 170 (1965). The child finds himself in detention, typically, following arrest by police officers; in neglect or dependency cases he will have been removed from the home by police or social welfare personnel pursuant to an "emergency seizure" provision. These actions are usually taken without prior judicial authorization.

It is desirable for counsel to investigate the necessity for such removal at the earliest opportunity and, if the client so wishes, seek the child's release. That detention or shelter care is a "temporary" expedient does not diminish its importance for the child or for the child's parents. The disadvantages of disrupting a family are expressly recognized by existing statutory and other authority, which generally approve removal only in cases of "clear necessity." *Id.* at 170; NCCD, *Model Rules for Juvenile Courts*, Rule 12 and Comment thereto (1969). For the young child typically involved in child protective proceedings, separation from parents must be assumed to be a most serious matter. There is wide agreement that placement in residential care, even only temporarily, will likely be experienced as a traumatic event by a normal infant. C. Heinicke & I. Westheimer, *Brief Separations* 4 (1965); 2 J. Bowlby, *Attachment and Loss*, *passim* (1973); J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 11-12 (1973). "Unlike adults," it has been observed, "young children experience events in an egocentric manner, *i.e.*, as happening solely with reference to their own persons. Thus they may experience, for example, the mere move from one house or location to another as a grievous loss, imposed on them; . . . the emotional preoccupation or illness of a parent as rejection; the death of a parent as intentional abandonment." Goldstein, Freud & Solnit, *supra* at 11-12. Moreover, the time sense of a young child does not operate by clock or calendar but in accordance with the child's instinctive and emotional needs; hence, children demonstrate intense sensitivity to the length of separation. *Id.* at 11. It has been suggested that, during the first eighteen months of life, discontinuity in care causes children distress and discomfort and delays their orientation and adaptation to their surroundings. For children under five changes



in care may, over time, affect the course of emotional and psychological development; for those of school age, further effects of these kinds may occur. *Id.* at 32-34. While these consequences probably vary with the duration and frequency of separation, Bowlby, *supra* at 11; Heinicke & Westheimer, *supra* at 214, it bears emphasis that pre-trial care may well last weeks or even months prior to adjudication. Moreover, difficulties occasioned by removal seem to be specifically associated with separation from the custodial parents, at least for young children, Heinicke & Westheimer, *supra* at 325-26; thus, difficulties of this kind may be anticipated even where the child can be placed in a single certified shelter home for the duration. Such placements are not, however, common, see Rosenheim, "Detention Facilities and Temporary Shelters," in L. Pappenfort, *Child Caring: Social Policy and the Institution* 253, 276-77 (1973), and matters will almost certainly be aggravated if multiple or substandard placements are required.

For the older child facing delinquency or supervision charges, detention is also a most serious and potentially harmful matter. In the first place, "brief" confinement is not always or even usually the case. While two week or shorter maxima are sometimes stated in juvenile codes, *e.g.*, NCCD, *Standards and Guides for the Detention of Children* 30 (2d ed. 1961), stays of a month and even longer are too common to be ignored. See Ferster, Snethen & Courtless, "Juvenile Detention: Protection, Prevention or Punishment," 38 *Ford. L. Rev.* 161, 196 (1969). Maintenance in a facility for delinquents or in a separate wing of a jail may tend to confirm a child's self-perception as a delinquent. Equally important, treatment of this kind may lead the child's peers, teachers, employer or even parents to label him or her as a delinquent, thereby forcing the child into or reinforcing a harmful pattern of behavior. That initial labeling can significantly affect a teacher's perceptions of a child has been dramatically shown. See, *e.g.*, Garfield, Weiss & Pollack, "Effects of Child's Social Class on School Counselors' Decision-Making," 20 *J. of Counseling Psychology* 166 (1973). Indeed, the simple fact of removal from the community necessarily entails disadvantageous consequences with respect to school or current employment.

Detention also has significance for the specific proceedings the client faces. It is familiar and well-documented knowledge that adults detained pending trial are disproportionately likely to be convicted and to receive severe sentences. *E.g.*, D. Freed & P. Wald, *Bail in the United States* 45-48 (1964); S. Bing & S. Rosenfeld, *The Quality of Justice* 63 (1970). While these studies do not seem to have been duplicated in juvenile courts, there is reason to think the results

would be comparable. The minor who is released will better be able to assist counsel in preparing a defense, if any is to be offered. In addition, a satisfactory home adjustment may well be persuasive on the question of disposition or, where need for care and supervision is a jurisdictional element of delinquency, at adjudication as well. See R. Boches & J. Goldfarb, *California Juvenile Court Practice* 58 (1968).

6.4(b)

Where the intake department has initial responsibility for custodial decisions, the lawyer should promptly seek to discover the grounds for removal from the home and may present facts and arguments for release at the intake hearing or earlier. If a judicial detention hearing will be held, the attorney should be prepared, where circumstances warrant, to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or for detention. The attorney should also be prepared to present evidence with regard to the necessity for detention and a plan for pretrial release of the juvenile.

*Commentary*

The first opportunity to question removal of the child will be at the preliminary inquiry, since determination of the necessity for detention or shelter care is, commonly, among intake department functions. As with other intake matters, the lawyer may be able to ascertain facts and present evidence which will supplement or contradict the information upon which removal was based and, thereby, persuade the intake officer to order release pending adjudication. R. Boches & J. Goldfarb, *California Juvenile Court Practice* 57 (1968).

More often, counsel's initial challenge to seizure of the child will occur at a judicial detention hearing. It is beyond doubt true that children have been detained, perhaps frequently, in cases where the state has no reasonable basis for assuming jurisdiction. *Report of California Governor's Committee on Juvenile Justice*, pt. 1 at 41-42 (1960); Rosenheim & Skoler, "The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings," 11 *Crime & Delinq.* 167, 386 (1967). Counsel should, therefore, examine and, if appropriate, prepare to contest the jurisdictional allegations upon which intervention is founded. By the same token, the lawyer must be alert to assert the client's privileges and rights at this early stage so that

delinquency is not, in effect, established during the detention hearing. Rosenheim & Skoler, *supra*.

Even if the allegations would bring the child within the court's jurisdiction, counsel may appropriately question the procedures and criteria used at arrest or intake and the place of detention or shelter care. Custody is generally allowable only when the community's protection or the child's protection so requires, yet some jurisdictions detain excessively and for reasons unrelated to stated criteria. Removal of children from their homes in order to give them a "taste of confinement" has been repeatedly documented, *e.g.*, U.S. Children's Bureau, *A Study of the Provision of Youth Services and Youth Service Boards, Commonwealth of Massachusetts*, pt. III at 27 (1966) (*Massachusetts Study*); U.S. Children's Bureau, *A Report of a Five Day Study of Services to Delinquent Children in Trent County, Texas*, pt. II at 17. Detention as a response to political pressure also doubtless occurs. Rosenheim & Skoler, *supra* at 385. It is, of course, true that clear proof of the criteria actually employed in deciding on detention or shelter care is rarely available and that the governing legal standards are typically broad; nevertheless, counsel should be prepared to insist on adherence to those standards and resist any form of detention or shelter care that is apparently based on improper factors.

The lawyer should also consider the appropriateness of the place of detention. In many jurisdictions, for example, neglected children or even children alleged to be in need of supervision may not be held in a place where alleged delinquents are detained. Similarly, intermingling of minors with adults awaiting trial is generally prohibited. *E.g.*, Calif. Welf. & Inst. Code §§ 506-508; Minn. Stat. Ann. § 260.175; N.D.C.C. § 27-20-16; Pa. Stat. Ann. tit. 11, § 50-311(a). Counsel should ordinarily raise immediate and strong objection to placement in violation of these rules. It is also too often the case that detention facilities and staff are entirely unsuited to the tasks for which they are employed. See Ferster, Snethen & Courtless, "Juvenile Detention: Protection, Prevention or Punishment?" 38 *Ford. L. Rev.* 161, 188 (1969); Rosenheim, "Detention Facilities and Temporary Shelters," in L. Pappenfort, *Child Caring: Social Policy and the Institution* 253 (1973). Moreover, virtually all detention facilities lack personnel and programs appropriate for children with special physical, emotional or psychiatric problems. See *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967); *In re Harris*, 2 Crim. L. Rptr. 2412 (Cook Cty. Cir. Ct., Juv. Div., Dec. 22, 1967). Where the place of detention or shelter care appears to fall below acceptable standards for the care of children generally or cannot provide particular ser-

vices needed by the client, the lawyer should seek to establish those circumstances at the detention hearing and, if necessary, collaterally attack the custodial arrangement. See *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Marterella v. Kelley*, 359 F. Supp. 478 (S.D.N.Y. 1973).

Finally, the court may have available to it a choice of shelter care or other nonrestrictive placement with family or friends, rather than detention for the respondent. Counsel may be of assistance to the client by directing the court's attention to less drastic forms of intervention, even where it is clear that temporary removal of the child is required.

In order to participate significantly at the detention stage, the lawyer must thoroughly investigate all potentially significant circumstances. Counsel should seek, formally or informally, copies of police and probation reports and verify any favorable information obtained about the child or the parents. When circumstances so demand, and to the extent that time permits, exploration of alternative placement with family or friends or with day release should be undertaken. Any plan of this kind must be fully understood by all parties concerned and the client's agreement to its presentation must be secured. If counsel proposes to have the minor released to the custody of a parent or to some other person, it is of the greatest importance that the proposed custodian be present at the detention hearing and prepared to assure the court that he or she can and will provide adequate care for the child. The attorney should emphasize to the proposed custodian the necessity for attendance at the detention hearing and, if necessary, seek to facilitate such attendance.

6.4(c)

The lawyer should not personally guarantee the attendance or behavior of the client or any other person, whether as surety on a bail bond or otherwise.

*Commentary*

Service by counsel as surety for the appearance of the client or of another has been sharply condemned by the ABA *Standards Relating to the Defense Function*, § 3.6(b), and the ABA *Standards Relating to Pretrial Release*, § 5.4 (App. Dr. 1968). That practice is no less destructive of professional objectivity and of loyalty to the client's interests in juvenile representation. It should further be noted that any form of personal guarantee or acceptance of personal responsibility by the lawyer for the client's behavior

may detrimentally affect the professional relationship and should be avoided by counsel.

## PART VII. ADJUDICATION

### 7.1 Adjudication without trial.

(a) Counsel may conclude, after full investigation and preparation, that under the evidence and the law the charges involving the client will probably be sustained. Counsel should so advise the client and, if negotiated pleas are allowed under prevailing law, may seek the client's consent to engage in plea discussions with the prosecuting agency. Where the client denies guilt, the lawyer cannot properly participate in submitting a plea of involvement when the prevailing law requires that such a plea be supported by an admission of responsibility in fact.

#### *Commentary*

It is familiar knowledge that negotiated pleas of guilty account for the great majority of dispositions in criminal cases. Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," 46 *J. Crim. L., C. & P. S.* 780-90 (1956); Blumberg, "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession," 1 *Law & Soc. Rev.* 15, 18-19 (1967). Despite its prevalence and apparent importance in adult prosecutions, however, the nature of delinquency definitions and dispositional theory has been thought to make plea bargaining unusual in juvenile court. In particular, bargaining is considered difficult or impossible because a juvenile court judge may and perhaps should determine disposition according to respondents' "best interests" rather than their adjudicated conduct. R. Emerson, *Judging Delinquents: Context and Process in Juvenile Courts* 22 (1969).

It is, nevertheless, clear that certain forms of plea bargaining—particularly discussion regarding plea and recommended disposition—do occur with regularity in some jurisdictions. *E.g.*, W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 135 (1972). The traditional absence of a prosecuting attorney in the juvenile courts may well have served as a greater deterrent to plea negotiation than anything in the formal law. However, with the increasing participation in juvenile courts of attorneys for the state, an increase in opportunities for bargaining can also be expected.

Lawyers engaged in juvenile court practice may, then, be in a position to negotiate much as they would in an adult case. Whether this method of dispute resolution should be allowed has, of course, been the subject of sharp controversy. Compare National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973) (calling for abolition of the practice); ABA, *Standards Relating to Pleas of Guilty* § 3.1-4 (App. Dr. 1968) (which assumes that plea bargaining in criminal cases is proper and desirable or, at least, inevitable, and therefore should be regulated to eliminate its most objectionable features). In so far as counsel is concerned, the propriety of engaging in plea discussions is a function of its approval or disapproval under local law. The lawyer's conduct, here as elsewhere, is largely determined by the avenues for disposition made available in the jurisdiction where he or she practices. If that jurisdiction views plea negotiation as a legitimate method for resolving a juvenile case, there can, by hypothesis, exist no general objection to its utilization by defense counsel. As in all other aspects of representation, of course, plea negotiation must be conducted according to the client's interests and not the attorney's professional or personal convenience. See § 3.1(a), *supra*. Whenever circumstances permit such negotiations, the attorney should seek the client's authorization before engaging in discussions regarding a plea. The decision to enter into this process, like acceptance of an offered bargain, is properly allocated to the respondent after full consultation with counsel. See §§ 3.1, 5.2, *supra*; ABA, *Standards relating to the Defense Function* § 6.1(c) and Commentary thereto.

A recurring issue arises when counsel advises a client that conviction is likely and the latter, while denying responsibility for the acts or conditions alleged, agrees to or desires to seek a plea bargain. The ABA *Standards Relating to the Defense Function* (at § 5.3) requires an attorney in this circumstance to disclose the client's denial of guilt to the court as a condition to presentation of the plea. Although such disclosure may involve confidential matter, that rule is justified by the principle that a court ought not be required to accept a defendant's legal conclusion regarding guilt. In this respect, the requirement that counsel inform the judge of facts negating a client's responsibility is a corollary to the court's duty to inquire of the accused or to take evidence from the prosecution to establish a factual basis for the plea. See *id.* at 242.

The ABA *Standards for Criminal Justice* do not, however, distinguish between jurisdictions that allow entrance of a plea accompanied by claims of factual innocence and those where such a plea cannot be accepted by the trial judge. If respondents are entitled

to enter a plea under these circumstances, attorneys must be allowed to assist them in doing so, subject to all the local rules for making such a plea. On the other hand, lawyers may not, consistent with this standard, properly participate in submission of a guilty plea when local law requires a statement of factual guilt and a client maintains his or her innocence. To assist the client in this situation amounts to an attempt, almost surely through deceit in some form, to undermine the policy adopted in states that reject so-called "Alford" pleas. See commentary to § 6.3(b), *supra*. While attorneys may effectively be disabled from plea bargaining on behalf of their clients in cases where the latter cannot perform the psychological act of confession, their clients' desires and their own convenience must give way to the limits placed by law. See ABA, *Code of Professional Responsibility* DR 7-101(A), 7-102 (A).

**7.1(b)**

The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency. Where it appears that the client's participation in a psychiatric, medical, social or other diagnostic or treatment regime would be significant in obtaining a desired result, the lawyer should so advise the client and, when circumstances warrant, seek the client's consent to participation in such a program.

*Commentary*

For a variety of sound tactical reasons, it is unusual for the defendant in a criminal matter to attend plea discussions. There is, concomitantly, an obligation on counsel's part fully to communicate the substance of those discussions to the client and, particularly, to inform the client of any offers made or acquiesced in by the prosecutor. ABA, *Standards Relating to the Defense Function* 249-250. The same circumstances obtain in juvenile court representation. Children may, during plea discussions, make statements which could be used against them at trial even when cautioned of that danger by their lawyers. Moreover, the presence of a youthful client is peculiarly likely to impede negotiations between counsel. Plea discussions in juvenile court typically turn on dispositional recommendations rather than charges, in the course of which information concerning respondent's background, family, mental and physical condition may well be germane. Some of these data and conclusions may be so delicate or even potentially harmful to clients and their families that

they ought not be disclosed in their presence. Compare § 9.3 and commentary thereto, *infra*. Accordingly, it is proper and indeed generally desirable for counsel to conduct these negotiations outside the presence of the respondent and, by the same token, to assume an affirmative responsibility fully to inform respondent of the direction and possible fruits of the negotiations. If this is not done, the respondent will largely be disabled from intelligently choosing whether to accept or reject any available plea arrangement. See § 5.2 and commentary thereto, *supra*.

In presenting any potential plea bargain, the attorney must take care accurately to describe the state of affairs. Juvenile clients, like adults, may assume that an agreement with the prosecutor binds or has been approved by the trial judge. Counsel should, therefore, frankly inform the client of the possibility that a recommended disposition will not be accepted and of the dispositional alternatives which may be invoked in the event that a proposed disposition is rejected. If it appears that the client has difficulty in understanding the nature of and risks associated with any bargained plea, counsel may appropriately seek permission from the client to call in the client's parent, other relative or friend to assist in clarifying the matter. See ABA, *Standards Relating to the Defense Function* 250.

In some cases, perhaps most frequently where a consent decree is in question, the client's participation in a psychiatric, medical, social or other diagnostic or treatment regime may be important. Counsel is, for reasons given above, bound to inform the client of that circumstance, of the actual nature of the program at issue and of the probable consequences of failure to participate in such a program. After advice and consultation, the decision concerning enrollment in any such regime, like acceptance of the bargained plea itself, is ordinarily reserved for the client. See §§ 3.1, 5.2, *supra*.

#### 7.2 Formality, in general.

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

#### *Commentary*

Traditional juvenile court theory strongly de-emphasized, indeed condemned, formality in procedure and, as a concomitant, rejected



ordinary limitations on the reception of evidence, W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 15-22 (1972); Lindsey, "The Juvenile Court in Denver," in S. Barrows, *Children's Courts in the United States* 107 (1904). When attorneys did appear in juvenile cases, it was predictable that these well-entrenched preferences would be conveyed to counsel openly or covertly. See, e.g., McKesson, "Right to Counsel in Juvenile Proceedings," 45 *Minn. L. Rev.* 843, 846-47 (1961); Stapleton & Teitelbaum, *supra* at 130-31. There is considerable evidence that attorneys practicing in juvenile courts did in fact sense and accommodate their conduct to the demand for informality. Some lawyers have stated that, in representing children, they "avoid being legalistic at all" and "wouldn't press an objection here as [they] would in another court." Platt & Friedman, "The Limits of Advocacy: Occupational Hazards in Juvenile Court," 116 *U. Pa. L. Rev.* 1156, 1177 (1968). Another study confirms that in traditional courts—particularly those without the services of a prosecuting attorney—objections to proof are rarely made and informal procedures are followed, even in contested cases. Cayton, "Emerging Patterns in the Administration of Juvenile Justice," 4 *Urban L. J.* 373, 384 (1971). There is also reason to think that the structure of the court as well as the attitudes of its bench affect the manner and substance of counsel's conduct. Motion practice, for example, may be relatively more infrequent in traditionally organized juvenile courts than in those which allow adequate time for investigation and preparation of the defense. Stapleton & Teitelbaum, *supra* at 139-41.

It is inevitable that insistence upon informality in the juvenile courts has sometimes and perhaps often led to compromise or waiver, both at trial and for purposes of appeal, of critical rights which the respondent was legitimately entitled to claim. Moreover, the premises upon which the traditional preference for informality rest have largely been discredited. To the extent that informality in proceedings is justified by reference to a "nonadversarial" and cooperative view of juvenile proceedings, the reasons for its rejection may be found in the Introduction. And, to the extent that it reflects a notion that formality is threatening to the child and therefore countertherapeutic, see *State v. Scholl*, 167 Wis. 504, 167 N.W. 830 (1918), the factual accuracy of that assumption has been sharply questioned. See *In re Gault*, 387 U.S. 1, 26 (1967); S. Wheeler & L. Cottrell, *Juvenile Delinquency: Its Prevention and Control* 35 (1966).

While formalism for its own sake or for purposes of delay is obviously undesirable and in some circumstances unethical, counsel

for juvenile court respondents nevertheless should be charged with an express duty to make all motions, objections or requests necessary to protect a client's rights and to do so in whatever form and at such time as will best serve the client's interests. Certain motions, for example, are usually and for good reason made in writing rather than orally and before rather than during trial. A lawyer appearing in a juvenile court case should, when the same circumstances present themselves, follow that procedure even though it is "formal." See § 7.3(b), *infra*. Similarly, a good faith challenge to evidence should not be waived because the proceeding is "nontechnical." If proof is arguably incompetent, irrelevant, hearsay or otherwise objectionable and is damaging to a client's interest in the matter, counsel should exercise the same professional judgment in deciding whether to seek its exclusion that is called for in criminal or civil representation. See § 7.4, *infra*.

There is a more generalized value to reliance by counsel on appropriate formality. Written motions, evidentiary objections and the like serve to define the postures of attorney and client with respect to the proceedings. In a contested matter, insistence on conducting proceedings in accordance with customary litigative procedures may usefully express respondents' demands that their responsibility be established by adequate, competent proof, and without their cooperation. It moreover properly reflects the lawyer's association with a client's interests and independence from cooptative pressures where those exist. See commentary to § 3.1, *supra*. This does not argue, it should be said, in favor of needless technicality for wholly symbolic purposes; rather, it calls for exercising ordinary professional judgment under circumstances where such conduct is or may be systematically discouraged.

### 7.3 Discovery and motion practice.

#### (a) Discovery.

(i) Counsel should promptly seek disclosure of any documents, exhibits or other information potentially material to representation of clients in juvenile court proceedings. If such disclosure is not readily available through informal processes, counsel should diligently pursue formal methods of discovery including, where appropriate, the filing of motions for bills of particulars, for discovery and inspection of exhibits, documents and photographs, for production of statements by and evidence favorable to the respondent, for production of a list of witnesses, and for the taking of depositions.

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

*Commentary*

The importance of prompt and full pretrial discovery of evidence and other information material to representation has come generally to be accepted in civil and, more recently, criminal matters. See "Developments in the Law—Discovery," 74 *Harv. L. Rev.* 940 (1961); ABA, *Standards Relating to Discovery and Procedure Before Trial* (App. Dr. 1970). In certain circumstances, disclosure is deemed sufficiently important to present constitutional issues. On the one hand, failure of prosecuting authorities to provide exculpatory evidence to the defendant has been held to vitiate a conviction on due process grounds. *Brady v. Maryland*, 373 U.S. 83 (1963); *Moore v. Illinois*, 408 U.S. 786 (1972). On the other, failure by defense counsel to undertake necessary discovery may result in denial of effective representation and thereby denial of the sixth amendment right to counsel, particularly where an available defense is neglected in consequence of such failure. See commentary to § 4.3(b), *supra*.

Discovery practice is no less important in juvenile court matters. Petitions, particularly those alleging need of supervision, are often couched in vague and conclusory language insufficient to inform respondents of the charges they must face. Accordingly, the lawyer may be required to seek a bill of particulars or some similar device. See New York City Legal Aid Society, *Manual for New Attorneys* 139 (1971); McMillian & McMurtry, "The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?" 14 *St. Louis U.L.J.* 561, 580 (1970). If the client has given statements during investigation, their examination prior to trial is sometimes essential to determine whether a challenge to content or voluntariness should be made. Compare ABA, *Standards Relating to Discovery and Procedure Before Trial* § 2.1(a) (ii) and Commentary thereto. More generally, early discovery of evidentiary material allows counsel to prepare for trial and minimizes the risks of surprise, prejudice and delay. As with criminal prosecutions, pretrial devices facilitate the resolution of procedural and constitutional issues,

saving time and expense both to court and parties. See McMillian & McMurtry, *supra* at 580. Indeed, reliance on discovery is often of special importance in juvenile court representation since other avenues for learning about the case—such as the preliminary hearing or grand jury presentment—typically are not available.

In some courts, an attorney may accomplish most or all of the goals of discovery through informal processes. It has been reported, for example, that juvenile probation officers will commonly share with defense counsel the results of their intake or social investigations, including police reports and information obtained from welfare or school officials. R. Boches & J. Goldfarb, *California Juvenile Court Practice* 171 (1968). See also, Skoler & Tenney, "Attorney Representation in Juvenile Court," 4 *J. Fam. L.* 77, 86 (1964). Where, however, informal avenues of discovery are unavailable or inadequate, the lawyer must be prepared to invoke formal devices, such as motions for bill of particulars, discovery and inspection of exhibits, documents and photographs, production of statements and the like.

In pursuing disclosure, ascertainment of proper procedure in the jurisdiction may be difficult. Occasionally, court rules indicate the forms of discovery available in juvenile court proceedings. More typically, there are neither specific juvenile court rules nor specific provisions indicating that criminal or civil procedural rules govern juvenile court matters. A variety of approaches have developed among the states. Since juvenile court proceedings have traditionally been characterized as "civil," it might be expected that civil rules of pretrial practice would govern. Generally, however, courts have refused blanket application of those devices in juvenile matters because of the "quasi-criminal" nature of the proceeding. A rule of judicial discretion has sometimes been employed, according to which the provision of specific discovery devices is determined in light of the purposes and requirements of the juvenile court process. *E.g.*, *People ex rel. Hanrahan v. Felt*, 48 Ill.2d 171, 269 N.E.2d 1 (1971); *Z. v. Superior Court*, 3 Cal.3d 797, 478 P.2d 26 (1970); *In re F.*, 346 N.Y.S.2d 316 (App. Div. 1973). The applicability of criminal rules of discovery is also unsettled. It probably is true that those rules which require disclosure in criminal prosecutions by virtue of the due process or confrontation clauses will apply to juvenile delinquency proceedings as well. See *District of Columbia v. Jackson*, 261 A.2d 511 (C.A.D.C. 1970); *In re Edgar L.*, 320 N.Y.S.2d 570 (Fam. Ct. 1971). Availability of non-constitutionally based criminal discovery techniques, however, differs among the jurisdictions.

With respect to in need of supervision, neglect and dependency proceedings, access to and procedures for discovery are if anything more uncertain. Relatively few cases, statutes or rules exist in these areas, and the rare judicial decisions employ vague standards for determining the availability of discovery. *E.g.*, *In re D*, 317 N.Y.S.2d 784 (Fam. Ct. 1970). (allowing use of civil discovery devices "where appropriate").

In view of the generally unsettled law of disclosure for juvenile court proceedings, lawyers must carefully investigate local rules and decisions in that regard. They should not, however, necessarily limit their activities to prevailing local juvenile court practice. In many juvenile courts, particularly those viewed as traditional, there exists an emphasis on dispatch and informality which militates against formal, adversarial techniques of preparation for trial. Regardless of the merits this approach may be thought to have, where discovery is crucial to effective representation the duty of attorneys to their clients requires pursuit of any procedures for which good faith argument can be made.

#### 7.3(b) Other motions.

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

#### *Commentary*

In both civil and criminal matters, pretrial motions are commonly used to present a party's legal claims and defenses in such a way as to remove from the trier of fact issues and evidence extrinsic to their function. Accordingly, efforts to suppress physical evidence and confessions or to challenge the circumstances of a pretrial identification and the like are typically heard prior to trial.

The interests advanced by this strategy are obviously present in juvenile court proceedings as in any other. In many jurisdictions,

interrogation of children is subject to the rules governing criminal investigation.\* The legality of a juvenile's confession may, therefore, be subject to challenge on the grounds of inadequate advice of rights, and the reasons for insulating the jury from such matters are not less compelling because delinquency rather than crime is charged. The same may be said of challenges to "voluntariness" where the applicability of *Miranda v. Arizona*, 384 U.S. 436 (1966), has not been recognized. Fourth amendment rules concerning exclusion of evidence procured through illegal search and seizure have also generally been accepted in juvenile court proceedings, although the Supreme Court has not yet passed on that requirement. *E.g.*, *In re K.*, 14 Cal. App.3rd 94, 92 Cal. Rptr. 39 (1970); *In re Boykin*, 39 Ill.2d 617, 237 N.E.2d 460 (1968); *State v. Lowry*, 95 N. J. Super. 307, 230 A.2d 907 (1967); *In re M.*, 349 N.Y.S.2d 728 (App. Div. 1973). Again, the nature of challenged exhibits and the circumstances of their seizure are matters of which the jury should not be aware until admissibility has been determined.

Although some juvenile courts may discourage, openly or covertly, devices that confine the fact-finder's frame of reference and impart formality to the proceedings, considerations of effective representation and preservation of the record ordinarily require that motions of the kinds discussed above be made in writing before trial, and that they be vigorously prosecuted. As in other aspects of juvenile court practice, it is not permissible for an attorney intentionally to abandon defenses which the client is entitled to raise, or to present those defenses less than fully, because the attorney perceives that professional disadvantage may result from such conduct.

#### 7.4 Compliance with orders.

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

\**E.g.*, *In re Roderick P.*, 7 Cal.3rd 801, 500 P.2d 1 (1972); *In re K.W.B.*, 500 S.W.2d 275 (Mo. App. 1973); *United States v. Ramsey*, 367 F. Supp. 1307 (D. C. Mo. 1973); *In re Collins*, 253 N.E.2d 824 (Ohio App. 1969); *People v. Horton*, 126 Ill.App.2d 401, 261 N.E.2d 693 (1970); *Choate v. State*, 425 S.W.2d 706 (Tex. Civ. App. 1968).

*Commentary*

It is the responsibility of the trial judge to control the conduct of any legal proceeding. The adversaries and their representatives are bound to respect the judge's rulings and orders and promptly to comply with them. Breach of this duty may constitute unprofessional conduct and contempt of court. H. Drinker, *Legal Ethics* 69 (1953). See *Sacher v. United States*, 343 U.S. 1 (1952). The power to punish for contumacious conduct inheres in the juvenile court as in other tribunals. *In re Shoemaker*, 234 La. 932, 102 So.2d 220 (1958).

The lawyer's duty of respectful compliance does not, of course, imply abandonment of the client's legitimate interests. Counsel may ask the court to reconsider adverse rulings and should preserve for appeal any adverse rulings and judicial conduct he or she considers improper and prejudicial. Failure of the court to permit such efforts is an express violation of the *Canons of Judicial Ethics*. ABA, *Canons of Judicial Ethics*, Canon 22.

**7.4(b)**

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

*Commentary*

The point was made above that traditional juvenile court practice substantially departed from usual modes of proof. § 7.2, *supra*. See S. Barrows, *Children's Courts in the United States* 107 (1904). Where the right to confrontation obtains, such disregard for evidentiary principles is no longer permissible. *In re Gault*, 387 U.S. 1, 57 (1967). In addition, many jurisdictions by statute or decision have come to apply general rules of evidence to juvenile proceedings.

Despite the dislike for "technical" objections sometimes found even now among juvenile court personnel, counsel has the duty to protect the client's interests by every lawful means, including resort to ordinary principles of proof and disproof. Counsel should, of course, exercise professional judgment in deciding whether to challenge any given question or offer of evidence, and failure formally to raise an objection is often consistent with sound trial strategy rather

than abandonment of responsibility. As in every other situation, however, counsel's professional judgment must be exercised in the client's interests. When evidence is offered or a ruling made that the lawyer considers prejudicial to the client's interest and there exists a good faith basis for challenge, the attorney is obliged to make proper objection, not only for purposes of informing the trial judge but also for appellate purposes. This duty exists where the challenge is directed to a general court practice concerning the receipt of evidence or trial procedure, as well as in the more usual instance of objection to an evidentiary or other ruling specifically directed to the issues presented in the case.

#### 7.5 Relations with court and participants.

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

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

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

#### *Commentary*

Among the principal functions of counsel in any setting is the removal of considerations not material to resolution of a legal dispute. Thus, however unpleasant relations are between the parties, "such ill feeling should not influence a lawyer in his conduct, attitude and demeanor towards opposing lawyers," ABA, *Code of Professional Responsibility* EC 7-37, nor towards any other participant. Rules of formality and professionalism in conduct before the court are closely related to accomplishment of this end and thus are not mere relics of protocol. The requirement that attorneys address the judge rather than one another is intended to promote calm exchange on disputed matters by reducing direct and potentially bitter confrontation between adversaries. The same is true of rules concerning decorum. Objections to questions or other evidence, argumentation and the like are properly made in the form of a request to the judge and postured, at least ultimately, according to the legal issues



involved. Such formality not only is required by the nature of the forum but conduces toward orderly and accurate resolution of the controversy.

Professional demeanor also serves to manifest and preserve respect for the court and its decisions, not for the sake of any temporary incumbent of judicial office, but for the maintenance of that office's authority. ABA, *Canons of Professional Ethics*, Canon 1; ABA, *Code of Professional Responsibility* EC 7-36; American College of Trial Lawyers, *Code of Trial Conduct* § 18(a). While an attorney may, in restrained tone and through appropriate devices, challenge the integrity or competence of a judge or the propriety of a judicial act, counsel may not employ belligerence, vituperation or discourtesy to those ends. H. Drinker, *Legal Ethics* 69-70 (1953). The maintenance of a formal and respectful manner toward witnesses is likewise important to preservation of the court's dignity and public regard. Thorough and vigorous cross-examination of a witness is often an integral part of counsel's duty to the client; that responsibility must, however, be discharged without gratuitous insult or immaterial personal attack. ABA, *Standards Relating to the Defense Function* § 7.1(c) and Commentary thereto.

Although formality has traditionally been discouraged in juvenile practice, adoption of a professional and respectful posture is important even in that forum. In some circumstances, of course, specific rules of trial conduct will not apply in juvenile court or will take a somewhat different direction than in civil or criminal court matters. Where, for example, judges assume responsibility for developing the facts, they function in much the same way as district attorneys; counsel therefore cannot practically separate the source of testimony or objection from the arbiter and must address directly one who may realistically be, for the time, the adversary. See W. Stapleton & L. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* 137-38 (1972). In other jurisdictions, the task of developing the facts is performed by a probation or police liaison officer. Where this is the case, a lawyer should always treat the person presenting the case as if he or she were opposing counsel, unless the person assuming the role of prosecutor also testifies in the matter. The difficulties presented by this situation are unavoidably complex. See ABA, *Code of Professional Responsibility* DR 5-101(B) and 5-102. To the extent possible, however, an attorney should treat the police liaison or probation officer acting as prosecutor as a professional adversary when the latter is not acting as a witness. These special instances, however, do not imply general abandonment of the rules governing trial con-

duct. Certainly if a prosecuting attorney does appear in juvenile cases, all of the usual reasons for professionalism obtain.

There is, in addition, a broader value in adhering to formal modes of behavior in juvenile court. Ceremony and dignity give structure to proceedings which will, in turn, better enable participants and especially respondents to understand the roles of the various actors. It has frequently been suggested that informality may give clients the impression of a confusing and even confused organization and seem inconsistent with the gravity of the hearing to those involved. Studt, "The Client's Image of the Juvenile Court," in M. Rosenheim, *Justice for the Child* 200, 202 (1962). See D. Matza, *Delinquency and Drift* 115, 124-29 (1964). For these reasons, the court hearing loses both rationality and symbolic value for the accused and their families. Studt, *supra* at 202-205. See also R. Emerson, *Judging Delinquents: Context and Process in Juvenile Court* 176-79 (1969). Customary formal behavior in adjudicative and dispositional appearances will often better comport with the parties' expectations, and therefore occasion greater confidence in the proceeding.

**7.5(b)**

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

*Commentary*

Few things detract more from the appearance of justice than obvious chumminess between defense counsel and opposing counsel or, in the context of juvenile proceedings, a probation officer who will act as prosecutor or hostile witness. It has already been observed that children, particularly those who are poor and members of a minority group, often view their attorneys with suspicion. Commentary to § 4.2(a), *supra*. Failure by counsel to maintain a professional demeanor in dealing with other court functionaries, and especially those whose activities are inconsistent with the child's interests in the case, may reinforce that suspicion or create distrust where none existed before. The lawyer will come to be viewed as associated in interest with the court or probation department rather than with the respondent, to the inevitable prejudice of both the attorney-client relationship and the perceived legitimacy of the juvenile justice system.

#### 7.6 Selection of and relations with jurors.

Where the right to jury trial is available and exercised in juvenile court proceedings, the standards set forth in sections 7.2 and 7.3 of the ABA Standards Relating to the Defense Function\* should generally be followed.

##### *Commentary*

Although juveniles charged with delinquency are not entitled to trial by jury as a federal constitutional matter, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), that right is recognized by state statute or constitution in approximately twelve jurisdictions. See authorities cited in *McKeiver v. Pennsylvania*, 403 U.S. 528, 549, n.9 (1971); *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968); *R.L.R. v. State*, 487 P.2d 27 (Alas. 1971); *Commonwealth v. Thomas*, 269 N.E.2d 277 (Mass. 1971).

Where jury trial is available and chosen, counsel's role in selecting and dealing with jurors is the same in juvenile proceedings as in criminal prosecutions. The defense attorney should initially prepare for voir dire by examining the validity of selection procedures and becoming familiar with the issues so as to be able to frame questions and make appropriate challenges to veniremen. When inquiry into the background of prospective jurors is warranted, counsel may not harass and unnecessarily embarrass the panelists or invade their privacy. ABA, *Standards Relating to the Defense Function* §§ 7.2(a) and (b).

Moreover, the voir dire process in juvenile as in criminal proceedings is designed only to allow investigation regarding the attitudes of prospective jurors; it is not properly used as a vehicle for presentation of legally inadmissible evidence or for early argumentation of the case. See ABA, *Standards Relating to the Defense Function* § 7.2(c). By the same token, the lawyer should not engage before or during trial in activities calculated to undermine the jury's objectivity and neutrality. ABA, *Code of Professional Responsibility* EC 7-29. Counsel may not ethically communicate privately with a juror or potential juror prior to or during trial and counsel should, furthermore, avoid the appearance of such communication. The currying of favor with the jury through undue manifestations of concern for its comfort and convenience is similarly proscribed. ABA, *Standards*

\*Sections 7.2 and 7.3 are reproduced in Appendix A, *infra*.

*Relating to the Defense Function* §§ 7.3(a) and (b); H. Drinker, *Legal Ethics* 84-85 (1953).

An attorney engaged in juvenile representation who reasonably suspects improper influence on or conduct by a juror or jurors may interview panelists after the trial in order to investigate that possibility. Before doing so, however, the lawyer is obliged to notify the court and opposing counsel of the proposed interview and may not comment on an adverse verdict or interrogate jurors for the purpose of harassing or embarrassing the jury. ABA, *Standards Relating to the Defense Function* § 7.3(c); ABA, *Code of Professional Responsibility* EC 7-29.

#### 7.7 Presentation of evidence.

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

#### *Commentary*

The standards set forth in this section are identical to those governing representation in civil and criminal cases generally. Compare, *e.g.*, ABA, *Standards Relating to the Defense Function* § 7.5. There is nothing unique to juvenile court practice that would justify relaxation or enhancement of customary principles concerning presentation or use of evidence.

The duty of the lawyer to advance a client's interests has never justified the knowing use of false evidence, fabricated documents or perjured testimony by a witness. ABA, *Code of Professional Responsibility* DR 7-102(A) (4) and EC 7-1. Manufacture, alteration and suppression of evidence have been held grounds for disbarment or suspension in a number of cases. See, *e.g.*, cases collected in Annotation, "Fabrication or Suppression of Evidence as Ground of Disciplinary Action Against Attorney," 40 A.L.R.3d 169 (1971); ABA, Opinion 131 (1935).

It is also unprofessional conduct for a lawyer in any setting intentionally to disregard an established rule of procedure or evidence. ABA, *Code of Professional Responsibility* DR 7-106(C)

(7). These rules cannot be viewed merely as obstacles to be circumvented through sharp practice; they serve to define the proper scope and manner of legal inquiry. It is then, misconduct for an attorney knowingly to bring inadmissible evidence to the attention of the trier of fact or to ask a question known to be improper. Such tactics can only be intended to subvert the administration of justice and are subject to the strongest censure. *Id.* at DR 7-106(C) (1) and (2). Similarly, comment and argument known to be impermissible generally or on the basis of the evidence before the court may call for professional discipline. *Id.* at EC 7-25. These are the tactics of the "shyster and the pettifogger," Warvelle, *Essays in Legal Ethics* 110-11 (2nd ed. 1920), which are surely no more suitable in juvenile court litigation than elsewhere.

The foregoing rules concerning intentional misconduct apply in both bench and jury trials. There are, as well, many situations in which lawyers engage unwittingly in behavior of these kinds. They may through inadvertence comment on matters not in evidence or display demonstrative evidence prior to its admission. While these incidents are objectionable, ordinarily they do not call for disciplinary action. At the same time, counsel should exercise great care to avoid such errors and follow procedures designed to minimize their occurrence, particularly where a jury is empaneled and the risk of prejudice from violation of evidentiary rules is greatest. In these cases, it is often desirable that the attorney tender an item of evidence with an offer of proof so that admissibility may be determined prior to display before the jurors. See ABA, *Standards Relating to the Defense Function* § 7.5(c).

#### 7.8 Examination of witnesses.

(a) The lawyer in juvenile court proceedings should be prepared to examine fully any witness whose testimony is damaging to the client's interests. It is unprofessional conduct for counsel knowingly to forego or limit examination of a witness when it is obvious that failure to examine fully will prejudice the client's legitimate interests.

#### *Commentary*

Examination of witnesses has long been the principal method of assessing the truthfulness and accuracy of judicial proof. It is an article of legal faith that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination and that only in exceptional situations should statements be used as testimony without having been probed by that instrument. 5 J. Wig-

more, *Evidence* § 1367 (Chadbourn rev. 1974). Through and, perhaps, only through cross-examination can that which has been suppressed be elicited; opportunity for observation be explored; bias be revealed; overstatement be corrected. *Id.* at § 1395. Its importance in our system of justice is further suggested by the constitutionally based rule requiring that those accused of a crime be given the opportunity to confront and cross-examine the witnesses against them. *E.g.*, *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965).

Because early juvenile court acts expressly indicated or were construed to mean that hearings should be "informal," the admission of evidence not subject to cross-examination was generally permitted. *E.g.*, *In re Holmes*, 379 Pa. 599, 109 A.2d 523 (1954), *cert. denied* 348 U.S. 973; *In re Bentley*, 246 Wis. 69, 16 N.W.2d 390 (1944). Most jurisdictions, for instance, authorized the introduction at adjudication hearings of social investigation reports prepared prior to adjudication, in the belief that the information they contain is necessary to a knowledge of the "whole client." *In re Corey*, 230 Cal. App.2d 813, 41 Cal. Rptr. 379 (1968); *In re Halamuda*, 85 Cal. App.2d 219, 192 P.2d 781 (1948). This traditional view was finally and expressly rejected for delinquency cases by the Supreme Court in *In re Gault*, 387 U.S. 1 (1967). "Absent a valid confession," the Court held, "a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." *Id.* at 57.

The right to cross-examine witnesses not only conveys a privilege to the juvenile respondent, but also imposes an obligation upon the respondent's attorney to use the most effective means of challenging the state's presentation through vigorous examination of its witnesses. See ABA, *Code of Professional Responsibility* DR 7-101(A) (1). It is true, of course, that whether and how to cross-examine are matters pre-eminently within counsel's professional judgment. *Id.* at DR 7-101(B). The line between tactical demands and abandonment of the duty of loyalty to a client will necessarily differ according to the facts of the case, but its existence cannot be doubted.

Ordinarily, lawyers will have no greater difficulty discharging this obligation in juvenile cases than they would in civil and criminal matters. There are, however, instances in which counsel may encounter resistance to thorough examination, particularly where court personnel are involved. Some judges manifest a protective attitude toward social workers and probation officers who regularly appear

before them. See Note, "Representing the Juvenile in the Adjudicatory Hearing," 12 *St. Louis U.L.J.* 466, 483 (1968). It is indicative of the force associated with such a view that the public defender practicing before a Georgia juvenile court reports never having cross-examined a probation officer. Institute for Court Management, *Three Juvenile Courts: A Comparative Study* 216 (1972). Cf. R. Emerson, *Judging Delinquents: Context and Process in Juvenile Court* 20-22 (1969). While the appearance of social workers and probation staff at adjudication is presumably less frequent now than prior to the *Gault* decision, they may still present evidence in probation revocation hearings, some delinquency and supervision proceedings, and typically are the principal witnesses in child protection matters. In these cases, cross-examination may reveal reliance on the observations of others, weaknesses in conclusions drawn, or bias regarding a client or family. See R. Boches and J. Goldfarb, *California Juvenile Court Practice* 61 (1968). Demonstration of these facts may be critical to effective representation, particularly in neglect and dependency cases; where that is the situation, counsel is professionally required to subject official and other witnesses to as full and careful examination as protection of the client's interests demands.

#### 7.8(b)

The lawyer's knowledge that a witness is telling the truth does not preclude cross-examination in all circumstances, but may affect the method and scope of cross-examination. Counsel should not misuse the power of cross-examination or impeachment by employing it to discredit the honesty or general character of a witness known to be testifying truthfully.

#### *Commentary*

Whether a lawyer may cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness known to be telling the truth has been counted among the greatest dilemmas faced by defense counsel. Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions," 64 *Mich. L. Rev.* 1469 (1966). Unlike many other ethical issues, however, there is general agreement in principle, if not in detail, that some forms of cross-examination or impeachment are not only proper but, in certain circumstances, obligatory if lawyers are to discharge their duty to their clients. Failure to inquire into the capacity of key witnesses to observe and remember that which they describe, for example, effectively deprives defendants of an opportunity to

test the strength of the state's case, which is their entitlement upon prosecution for crime. Burger, "Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint," 5 *Am. Crim. L. Q.* 11, 14-15 (1966); Freedman, *supra* at 1474-75. A criminal or juvenile delinquency trial is, at base, a demonstration that the state can prove the defendant's guilt by competent evidence and beyond a reasonable doubt; the evidence introduced in the course of that demonstration is entitled to weight only to the extent of its objective reliability and credibility. For this purpose, counsel's knowledge that a witness' statement is in fact accurate does not negate the right to examine, any more than such knowledge would disable counsel from objecting to hearsay evidence because it happened to be factually accurate. In either case, the state must bear the burden of proof, and legitimate weaknesses of its presentation should be revealed to the judge or jury.

Moreover, refusal to cross-examine as to reliability or credibility verges on compromise of the principle of confidentiality. If the client had denied being present at the scene to counsel, the latter would be required to cross-examine thoroughly an eye witness stating the contrary. When a lawyer fails to do so only because the client, confiding in counsel, has been candid, the basis for confidence and candor is seriously affected. Freedman, *supra* at 1474-75. Indeed, the respondent may be further prejudiced by such openness to the lawyer since inquiry might reveal qualifying circumstances or even favorable information unknown either to client or counsel and not elicited through direct examination. 5 J. Wigmore, *Evidence* § 1368 (Chadbourn rev. 1974).

While counsel may properly examine any witness, including one known to be truthful, in order to reveal the sum and extent of the witness' knowledge, to test his or her memory, to show personal hostility, or any other matters affecting the reliability and credibility of the witness' testimony, certain limits ought to be recognized regarding the appropriate manner of cross-examination. To illustrate, it is generally and properly said that impeachment of a witness' character as, for example, by prior conviction for crime, should be avoided where counsel knows the witness to be telling the truth. See ABA, *Standards Relating to the Defense Function* § 7.6(b). To so impeach such a witness' character violates the rule against needless harassment and humiliation of a witness and might, under aggravated circumstances, justify professional discipline. Other forms of examination or impeachment might be improper in given circumstances: for example, the suggestion of general bias where no direct challenge to testimony can effectively be made. Ultimately, of



course, these standards involve matters of subjective knowledge and evaluation and must draw their substance and strength from prevailing notions of professional honor, *id.* at 273; they are not, however, less important for that reason.

7.8(c)

The examination of all witnesses should be conducted fairly and with due regard for the dignity and, to the extent allowed by the circumstances of the case, the privacy of the witness. In general, and particularly when a youthful witness is testifying, the lawyer should avoid unnecessary intimidation or humiliation of the witness.

*Commentary*

Vigorous and thorough cross-examination is a device intended for testing the reliability and credibility of witnesses, and not for purposes of their gratuitous intimidation or degradation. The lawyer must "treat with consideration all persons involved in the legal process and . . . avoid the infliction of needless harm." ABA, *Code of Professional Responsibility* DR 7-106 (C) (2). See also ABA, *Standards Relating to the Defense Function* § 7.6(a); American College of Trial Lawyers, *Code of Trial Conduct* § 15(d). Beyond these prohibitions, counsel may and should consider whether a technically permissible form of examination or impeachment, such as proof of a witness' prior conviction, is necessary or important to advancement of the client's interests in the matter. As a distinguished British advocate has observed:

The right of cross-examination is important. . . . But it is a right easily abused. One has always to remember that its object is not to examine crossly, as Mr. Baron Alderson put it; not to blackguard the witness; not to bring out unhappy or discreditable things there may have been in the witnesses' past unless they have a clear and direct bearing on the witnesses' credibility in the instant case.

Shawcross, *The Functions and Responsibilities of an Advocate*, 13 Record of A.B.C.N.Y. 483, 493-94 (1958), quoted with approval in ABA, *Standards Relating to the Defense Function* 271.

Negotiating the line between vigorous cross-examination and harassment of a witness is always a function of the facts presented in each case. New York County Lawyers Association, Opinion 43 (1914). Doing so may be particularly difficult in juvenile court proceedings when, as is often the situation, youthful witnesses ap-

pear. Children are commonly susceptible to pressure and confusion under questioning by an adult, and may be unable to place embarrassing questions in their proper context. See Stafford, "The Child as a Witness," 37 *Wash. L. Rev.* 303, 321-22 (1962). A child who is testifying should not be called a "liar" because the attorney catches the child in an inconsistency when it is reasonably plain that the witness' error results from difficulty in verbal expression, nor should the child's natural apprehension concerning the trial be exploited to cast doubt on evidence known to be truthful and accurate. The great latitude ordinarily allowed in examination of youthful witnesses should be fully employed in order to ascertain the strength and credibility of a child's evidence, since issues of liberty and reputation may be determined according to the child's testimony; it may not, however, be used simply to confuse or bully one who is in any event especially vulnerable to such tactics.

7.8(d)

A lawyer should not knowingly call as a witness one who will claim a valid privilege not to testify for the sole purpose of impressing that claim on the fact-finder. In some instances, as defined in the ABA Code of Professional Responsibility, doing so will constitute unprofessional conduct.

*Commentary*

When a lawyer knows that a prospective witness, *e.g.*, an alleged co-conspirator, will claim a valid privilege not to testify, insistence upon calling that witness can only be intended as an invitation to the fact-finder to infer that the witness' evidence would have damaged the party claiming privilege. This strategem will go far toward undermining the value of the privilege invoked and, concomitantly, the social policy accounting for its recognition. See ABA, *Standards Relating to the Defense Function* § 7.6(c) and Commentary; Annotation, 144 A.L.R. 1007 (1943).

Because of these considerations, it seems generally undesirable for counsel to call witnesses solely to have them publicly exercise a testimonial privilege. In some jurisdictions, this policy is reflected in decisional authority holding it improper for a lawyer, for example, to comment in any way on invocation of a privilege by the opposing party. *E.g.*, *Howard v. Porter*, 240 Iowa 153, 35 N.W.2d 837 (1949); *Sumpter v. National Grocery Co.*, 194 Wash. 598, 78 P.2d 1087 (1938) (civil cases; physician-patient privilege); *Courtney v. United States*, 390 F.2d 521 (9th Cir. 1968), *cert. denied* 393 U.S. 857,

*reh. den.* 393 U.S. 992; *State v. Levy*, 160 N.W.2d 460 (Iowa 1968) (criminal prosecutions; husband-wife privilege). In jurisdictions where it is clear that an inference may not properly be drawn from a claim of privilege, departure from this standard may constitute unprofessional conduct. ABA, *Code of Professional Responsibility* DR 7-102 (A) (8) and 7-106(C) (7). See ABA, *Standards Relating to the Defense Function* § 7.6 (Supplement); ABA, *Standards Relating to the Prosecution Function* § 5.7 (Supplement).

A number of other courts have not taken a defined position on the propriety of disclosure or comment on a claim of privilege or, in some instances, have approved such conduct. *E.g.*, *Phillips v. Chase*, 201 Mass. 444, 87 N.E. 755 (1909) (civil case; attorney-client privilege); *Nelson v. Ackerman*, 249 Minn. 582, 83 N.W.2d 500 (1957) (civil case; physician-patient privilege); *State v. Bell*, 67 N.D. 382, 272 N.W. 334 (1937) (criminal case; husband-wife privilege). For attorneys practicing in these jurisdictions, this standard may be viewed as a suggestion for practice rather than as a rule of professional responsibility.

7.8(e)

It is unprofessional conduct to ask a question that implies the existence of a factual predicate which the examiner knows cannot be supported by evidence.

*Commentary*

Just as it is unprofessional conduct for a lawyer intentionally to bring inadmissible evidence before the trier of fact, it is also improper to suggest the existence of facts that cannot be established by competent proof. Questions plainly conveying information excluded by the rules of evidence, hinting at the existence of significant though inadmissible facts, or implying the existence of a factual state which does not exist are all improper. ABA, *Code of Professional Responsibility* DR 7-106(C) (1). The sanction of professional discipline for violation of this standard is justified not only by the gravity always associated with intentional disregard of rules of procedure and evidence but because those rules provide little effective remedy, short of mistrial, for misconduct of the kind here involved. Even the asking of a question held improper can suggest that it has some basis in truth, which impression will predictably be emphasized rather than negated by objection and "curative" instruction. 6 J. Wigmore, *Evidence* § 1808 (Chadbourn rev. 1974).

**7.9 Testimony by the respondent.**

(a) It is the lawyer's duty to protect the client's privilege against self-incrimination in juvenile court proceedings. When the client has elected not to testify, the lawyer should be alert to invoke the privilege and should insist on its recognition unless the client competently decides that invocation should not be continued.

*Commentary*

Whether to invoke the privilege against self-incrimination is ultimately a matter for the respondent. § 5.2(a) (v), *supra*. The lawyer must accordingly take all steps necessary to preserve the privilege throughout the adjudicatory hearing. Special care is sometimes required in more informal courts, where arraignment or plea-taking in the usual sense does not occur. *Cf.* Lefstein, Stapleton & Teitelbaum, "In Search of Juvenile Justice: *Gault* and its Implementation," 3 *Law & Soc. Rev.* 491, 519 (1969). There may also be instances where pressure is brought on children or their attorneys to relinquish the privilege. See, *e.g.*, W. Stapleton & L. Teitelbaum, *In Defense of Youth; A Study of the Role of Counsel in American Juvenile Courts* 130-31 (1972). Counsel is obliged to insist on recognition of the client's privilege despite such circumstances unless the client, after consultation, determines that its invocation should be discontinued.

**7.9(b)**

If the respondent has admitted to counsel facts which establish his or her responsibility for the acts or conditions alleged and if the lawyer, after independent investigation, is satisfied that those admissions are true, and the respondent insists on exercising the right to testify at the adjudication hearing, the lawyer must advise the client against taking the stand to testify falsely and, if necessary, take appropriate steps to avoid lending aid to perjury.

(i) If, before adjudication, the respondent insists on taking the stand to testify falsely, the lawyer must withdraw from the case if that is feasible and should seek the leave of the court to do so if necessary.

(ii) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during adjudication without notice, it is unprofessional conduct for the lawyer to lend aid to perjury or to use the perjured testimony. Before the respondent takes the stand in these circumstances the lawyer should, if possible, make a record of the fact that respondent is

taking the stand against the advice of counsel without revealing that fact to the court. Counsel's examination should be confined to identifying the witness as the respondent and permitting the witness to make his or her statement to the trier of fact. Counsel may not engage in direct examination of the respondent in the conventional manner and may not recite or rely on the false testimony in argument.

*Commentary*

Representation of a defendant who confesses guilt in confidence has presented many of the most difficult ethical problems faced by the lawyer in criminal practice. See generally D. Mellinkoff, *The Conscience of a Lawyer* (1973). Among the most pressing of these problems occurs when the client admits responsibility for the acts or conditions alleged but insists upon taking the stand to protest his or her innocence. The lawyer must, of course, strongly advise the client against false testimony and of the penalty for perjury. When, however, it becomes evident that this advice will be or has been disregarded, counsel faces a severe dilemma. On the one hand, counsel is enjoined by the ABA *Code of Professional Responsibility* against knowing use of perjured testimony. DR 7-102(A) (4). On the other, the only remedies for intended or contemporaneous perjury are refusal to call the accused to testify on his or her own behalf, disclosure of the perjury to the judge, or withdrawal. The first alternative has rarely if ever been proposed, since the defendant could, practically and perhaps as a matter of constitutional right, insist on taking the stand. The second—revelation of false testimony by defense counsel—poses a direct challenge to the obligation of confidentiality at a particularly critical point. A third course of action, withdrawal from the case, is no less troublesome. In many jurisdictions, it is impossible for appointed counsel to withdraw except for extraordinary reasons. This will predictably leave the lawyer with a choice between revealing confidential communications or continuing representation in the case. Moreover, the mere request for leave to withdraw at a late stage will often tacitly disclose the client's position to the judge.

As might be expected, a variety of resolutions—none of them comfortable—has been proposed. According to one view, the obligation of confidentiality is controlling except where specifically relieved by the code: *i.e.*, when necessary to protect lawyers from accusations by their clients and to prevent commission of crime (other than perjury). Freedman, "Professional Responsibility of the

Criminal Defense Lawyer: The Three Hardest Questions," 64 *Mich. L. Rev.* 1469, 1478 (1966). This duty, "in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury." *Id.* at 1477-78; See ABA, Opinion 287 (1953). Another and quite different approach would assimilate an announced intention to commit perjury to other instances in which strong social interests outweigh that embodied in the doctrine of confidentiality, and permit disclosure to the court. *E.g.*, Noonan, "The Purposes of Advocacy and the Limits of Confidentiality," 64 *Mich. L. Rev.* 1485 (1966). See also "Professional Responsibility: Report of the Joint Conference," 44 *A.B.A.J.* 1159 (1958).

An intermediate position has been adopted by the Criminal Justice Standards Project and approved by the American Bar Association House of Delegates. If counsel is unable to dissuade the accused from testifying untruthfully, counsel is required to withdraw and, if necessary, seek court leave to take that action. Should withdrawal not be feasible for some reason, the attorney must walk a narrow line, and may neither lend aid to the perjury nor disclose the fact of perjury to the trier of fact. Specifically, counsel should put the client on the stand but not lend assistance in presenting false evidence. The attorney's participation is limited to introduction of the accused; together with an invitation to give a narrative statement. That testimony, once given, may not be quoted or otherwise relied on by the lawyer during argument or, presumably, for any other trial purpose. ABA, *Standards Relating to the Defense Function* § 7.7(C).

The accommodation reached by the criminal justice standard seeks to preserve confidentiality while staying within the code's injunction against knowing "use" of perjured evidence. It necessarily assumes that the defendant's privilege to testify and the interests of confidentiality are so important as to outweigh the goal of avoiding false evidence and fraudulent conduct by witness or parties. Whether it is wholly successful, even accepting that premise, may be questioned; certainly in a criminal bench trial and in the vast majority of juvenile cases, the prescribed technique will not avoid implicit disclosure of the party's perjury. An experienced judge can hardly fail to draw the obvious inference from counsel's remarkable trial conduct; indeed, it may be that only the witness is unaware of the context in which his or her testimony is given.

The approach adopted in the ABA *Standards Relating to the Defense Function* is followed here because there is no convincing ground for differentiating adult and juvenile cases for this purpose.

The rules of confidentiality are no less important because the client is a child or the proceeding occurs in juvenile rather than civil or criminal court. See § 3.3, *supra*. Nor does any reason appear for valuing the juvenile court respondent's testimonial privilege below that of a criminal defendant. If modification of the criminal justice standard is sought, it should be based on the premises of that standard itself.

#### 7.10 Argument.

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

#### *Commentary*

Argument by counsel in all cases—whether juvenile, civil or criminal—is subject to limitations imposed by the nature of judicial proceedings generally and by the evidence before the court in particular. It is the nature of judicial processes, at least in the Anglo-American tradition, that they are governed by the proof introduced or properly knowable by the trier of fact; in this sense, any trial is largely a demonstration by the parties of those propositions on which judgment will turn. Matters lacking rational or legal bearing on the ultimate questions before the court, or which for some other reason should not be revealed, are excluded from the consideration of the trier of fact immediately or at some later point in the hearing. The conduct of counsel is necessarily determined according to these principles of judicial dispute resolution, and intentional deviation from them may be grounds for professional discipline. Among the more salient rules regarding argument are the following:

**Arguments from the Evidence.** Any item of proof or disproof is received not only for its most direct meaning but for that which may reasonably be inferred from it. It is, accordingly, proper for lawyers to urge all inferences that may reasonably be drawn from the evidence in the record. Under certain circumstances, they may also invite the judge or jury to make inferences from the opponent's failure to introduce evidence available to it. See *Rizzo v. United States*, 304 F.2d 810 (8th Cir. 1962); ABA, *Standards Relating to the Defense Function* 278-79. It is clearly unprofessional conduct for an attorney intentionally to misquote a witness, to assert as fact something which has not been proved, or otherwise to misstate the evidence. ABA, *Code of Professional Responsibility* DR 7-106(C)

(7); American College of Trial Lawyers, *Code of Trial Conduct* 15(a) (1963). In the specific context of juvenile representation, a lawyer's intentional misrepresentation of the client's readiness to accept community services should also be considered unprofessional conduct and grounds for disciplinary action.

**Arguments Outside the Issues and Facts Presented.** Argumentation beyond the issues and facts actually presented in any case is improper and, if intentional, constitutes unprofessional conduct. For both trial and appellate purposes, the lawyer is constrained by the record and may not refer to or argue on the basis of facts not included in it, except for matters of common public knowledge or those of which judicial notice may be taken. See ABA, *Standards Relating to the Defense Function* § 7.9 and Commentary. It is equally improper for counsel to inject through argument issues extraneous to the nature of the case and the questions of law and fact actually involved. An appeal to broad social issues may seem especially tempting in juvenile cases, given the youth and minority group membership of the vast majority of clients; but, just as a prosecutor in a juvenile proceeding should not be permitted to argue for conviction because of general criminal conditions in the community, so defense counsel ought not encourage the jury or trier of fact to render judgment according to extrinsic political or social considerations. See *id.* at 282.

**Arguments from Personal Belief.** It has long been the rule that a lawyer "shall not . . . [a]ssert his personal opinion . . . as to the guilt or innocence of the accused. . . ." ABA, *Code of Professional Responsibility* DR 7-106(C) (4). Among the reasons compelling this principle are the following:

In the first place, [the lawyer's] personal belief has no real bearing on the issue; no witness would be permitted so to testify, even under oath, and subject to cross-examination, much less the lawyer without either. Also, if expression of personal belief were permitted, it would give an improper advantage to the older and better known lawyer, whose opinion would carry more weight, and also, with the jury at least, an undue advantage to the unscrupulous one. Furthermore, if such were permitted, for counsel to omit to make such a positive assertion might be taken as an admission that he did not believe in his case.

H. Drinker, *Legal Ethics* 147 (1953). Equally important, the prohibition reflects the fundamental relationship between lawyer and client, according to which the former is an advocate for particular



purposes and not a compurgator. See ABA, *Standards Relating to the Defense Function* 280. This last principle has particular significance in juvenile court representation, where some courts treat denial of the allegations and defense pursuant to denial as justified only when counsel believes in the client's factual innocence. See, e.g., W. Stapleton & L. Teitelbaum, *In Defense of Youth; A Study of the Role of Counsel in American Juvenile Courts* 131-33 (1972).

**Arguments from Prejudice.** Appeals to prejudice have no place in any system of justice. See ABA, *Standards Relating to the Defense Function* § 7.8. Appellate review of inflammatory racial, ethnic or religious remarks by defense counsel may not often be available; they are not for that reason proper. When a question of prejudice is legitimately in issue—as, for example, when an arrest is claimed to be based on racial bias rather than objective cause—that may appropriately be argued as long as argument is restricted to the evidence in the case and inferences reasonably drawn from that evidence.

## PART VIII. TRANSFER PROCEEDINGS

### 8.1 In general.

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

#### *Commentary*

It has been clear since *Kent v. United States*, 383 U.S. 541 (1966), that the decision to relinquish juvenile court jurisdiction has critical significance for the respondent in two senses. See also *Breed v. Jones*, 421 U.S. 519 (1975). On the one hand, it marks the end of the measures of protection associated with the juvenile justice system; on the other, it represents the initial stage of criminal prosecution. *Kent* at 561; *Watkins v. United States*, 343 F.2d 278, 282 (1964). Among the specific consequences that typically flow from a determination to proceed criminally against a child are detention before trial in adult rather than juvenile facilities, loss of the protection afforded by private trial and restricted records, and, most important, exposure to the same range of penalties that

applies to any adult prosecuted for the offense in question. In the dramatic but not unusual case where the respondent is charged with a major felony, the difference between treatment within the juvenile court and treatment by the criminal process is measured by the difference between commitment to a rehabilitative facility for a period not to exceed the child's attainment of majority and an extended prison term in an adult correctional facility or, conceivably, the death penalty. *E.g.*, *Kent v. United States*, 383 U.S. 541 (1966) (death penalty could have been imposed); *Hall v. State*, 284 Ala. 569, 226 So.2d 630 (1969) (fourteen year old waived and sentenced to life imprisonment). Moreover, most juvenile court statutes insulate those adjudicated delinquent from the civil disabilities, such as loss of the right to vote or disqualification from civil service appointment, commonly attendant upon conviction of a felony in criminal proceedings. See Comment, "Due Process and Waiver of Juvenile Court Jurisdiction," 30 *Wash & Lee L. Rev.* 591, 593 (1973).

Awareness of these consequences led the Supreme Court to conclude that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel. . . ." *Kent v. United States*, 383 U.S. 541, 554 (1966). A number of state statutes, model acts and judicial decisions follow this view in making assistance of an attorney available at this stage either by specific provision, *e.g.*, Alaska R. Juv. P. § 3(c), or through general provision of counsel at the respondent's first appearance in court, *e.g.*, Calif. Welf. & Inst. Code § 634. See *State v. Tuddles*, 38 N.J. 565, 186 A.2d 284 (1962); *Summer v. State*, 248 Ind. 551, 230 N.E.2d 320 (1967); *Templeton v. State*, 202 Kan. 89, 447 P.2d 158 (1968). Indeed, the National Council of Crime and Delinquency's *Model Rules for Juvenile Court* takes the position that legal advice is so important at transfer that assistance of counsel may not be waived. Model Rule 11; NCCD, *Provision of Counsel in Juvenile Courts* 14 (1970). Participation by an attorney is important to ensure that the child's right to treatment as a juvenile is preserved unless the conditions permitting waiver in the jurisdiction are established by competent evidence and fair process. This function is of particular importance since statutory guides to the transfer decision are frequently vague and subject to considerable discretion in application.\* Interpretation

\*Criteria such as "amenability to rehabilitation," and "best interests of the child or of the community," are frequently employed for this decision, *e.g.*, Iowa Code Ann. § 232.72; Mass. Gen. Laws ch. 119, § 61; N.M.S.A. § 13-14-27(A); *In re Whittington*, 17 Ohio App.2d 164, 245 N.E.2d 364 (1969); *Kent v. United States*, 383 U.S. 541 (1966). See Comment, *Waiver of Jurisdiction in Juvenile Courts*, 30 Ohio St. L.J. 132, 141 (1969); Mountford &

of such standards is obviously difficult for laymen, who will therefore be unable to determine what kind of evidence is relevant to transfer or to argue effectively regarding the sufficiency of evidence offered against them.

Participation of counsel also serves to minimize the effects of improper influence on waiver proceedings. The circumstances in which transfer is most likely to be sought and authorized are also those in which public feeling is likely to run highest and community pressure likely to exist. Charges that a juvenile court which retains jurisdiction in a notorious or well-publicized case is thereby "coddling" criminals must be anticipated and neutralized. The presence of an independent advocate may go far toward assuring that the child's position is presented and evaluated apart from media and other community pressure. See Comment, "Representing the Juvenile Defendant in Waiver Proceedings," 12 *St. Louis U.L.J.* 424, 437 (1968). Special point is given to this function by a survey of Ohio juvenile court judges, some of whom expressly indicated that public feeling concerning the offense did influence their decision at the transfer stage. Comment, "Waiver of Jurisdiction in Juvenile Courts," 30 *Ohio St. L.J.* 132, 142 (1969).

## 8.2 Investigation and preparation.

(a) In any case where transfer is likely, counsel should seek to discover at the earliest opportunity whether transfer will be sought and, if so, the procedure and criteria according to which that determination will be made.

### *Commentary*

In any case involving an older child and/or a serious charge, counsel must determine immediately whether transfer is permissible\*\* and

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Berenson, *Waiver of Jurisdiction: The Last Resort of the Juvenile Court*, 18 *Kan. L. Rev.* 55 (1969).

\*\*Virtually no jurisdiction allows transfer of every juvenile matter for prosecution as an adult. Most specify a minimum age below which transfer cannot be ordered, e.g., Calif. Welf. & Inst. Code § 707 (sixteen years); N.M.S.A. § 13-14-27(A) (1) (sixteen); Utah Code Ann. § 55-10-86 (fourteen); Miss. Code Ann. § 43-21-31 (thirteen). In addition, many states limit waiver to cases involving conduct which would be felonious if done by an adult. E.g., Fla. Stat. Ann. § 39.02 (5) (a) (Supp.1974); Mich. Comp. Laws Ann. § 712A.4 (1) (Supp. 1974); Miss. Code Ann. § 43-21-31; N.M.S.A. § 13-14-27(A) (1); Ohio Rev. Code Ann. § 2151.26; Utah Code Ann. § 55-10-86. Other restrictions on transfer combine these elements or incorporate additional considerations, such as recidivism. E.g., Mo. Ann. Stat. §211.071. See generally Mountford & Berenson, *supra* at 56-61; Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 *U. Toledo L. Rev.* 1, 21-22 (1974).

whether any practical risk of that course is presented. Often, an intake or probation officer will be in a position to say whether that process is actively under consideration, although such officer's initial view of the matter may be overruled by a supervisor, prosecuting attorney or the juvenile court judge or referee. See R. Boches & J. Goldfarb, *California Juvenile Court Practice* 123-124 (1968).

Where it appears that waiver of jurisdiction is in question, the lawyer should immediately become familiar with the procedure and criteria according to which that decision will be made. Early knowledge in these respects is important because radically different provisions are found among the states, and the attorney's course of action will differ accordingly. Under most juvenile court statutes, a judicial hearing is held to determine whether the criteria for transfer are met, e.g., Calif. Welf. & Inst. Code § 707; Ohio Code Ann. § 2151-26; N.M.S.A. § 13-14-27; N.D.C.C. § 27-20-34, and the lawyer will prepare for and conduct this aspect of a case in much the same way as an ordinary delinquency proceeding. In some jurisdictions, however, judicial review of that decision is not required; it is, rather, a matter of "prosecutorial discretion." E.g., 16 D.C. Code § 2307; 18 U.S.C. § 5032 (Federal Juvenile Delinquency Act). Whether a hearing or special administrative procedure is required under such provisions is unclear. Compare *United States v. Bland*, 472 F.2d 1329 (D.C. Cir. 1972), cert. denied 93 S. Ct. 2294 (1973) (prosecutorial discretion under D.C. code upheld) and *Cox v. United States*, 473 F.2d 334 (4th Cir. 1973) (suggesting that there must be an opportunity for at least an informal hearing by attorney general prior to transfer under the Federal Juvenile Delinquency Act). See Comment, "Juvenile Justice—Statutory Exclusions from the Juvenile Process of Certain Alleged Felons," 53 *B.U.L. Rev.* 212 (1973). Thus, an attorney must promptly examine the procedures for transfer and determine what steps to take to protect the client's interests.

Regardless of the form of procedure used to determine whether a client should be prosecuted as an adult, the attorney should also be familiar with the statutory and judicial criteria governing that decision. It has already been observed that these tend, often intentionally, to be broad and uncertain in content. Typically, the inquiry may range over the entire social, psychological and behavioral history of the respondent as well as the immediate conduct resulting in his or her appearance before the court. See Comment, "Representing the Juvenile Defendant in Waiver Proceedings," 12 *St. Louis U.L.J.* 424, 443 (1968). Accordingly, the lawyer must seek to ascertain not only formal standards for transfer (such as "amenability for treatment" or "need for protection of the community") but the circumstances

in which local trial and appellate courts have approved that step. Among the factors commonly considered are the seriousness of the offense, whether it was committed in a violent or premeditated manner, whether it was directed against persons or property, the substantiality of the evidence available, whether there are co-defendants who will be tried as juveniles or adults, the child's sophistication and maturity, his or her record and previous history, and the prospects for adequate protection of the public and for effective rehabilitation of the child through available resources. See *Kent v. United States*, 383 U.S. 541, 565-67 (1966), Appendix to Opinion of the Court.

#### 8.2(b)

The lawyer should promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to or may be considered by the court in the course of transfer proceedings. Where circumstances warrant, counsel should promptly move for appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protection of the client's rights.

#### *Commentary*

The critical nature of the transfer decision and the diffuseness of prevailing standards make thorough investigation and preparation essential to adequate representation at this stage. As at adjudication and disposition, a lawyer cannot provide effective assistance on the basis of brief familiarity with the case and the client's circumstances. *State v. Yard*, 109 Ariz. 198, 507 P.2d 123 (1973). See Comment, "Representing the Juvenile Defendant in Waiver Proceedings," 12 *St. Louis U.L.J.* 424, 439-443 (1968). The matters to be investigated have been discussed above; ordinarily, they include the prosecutive merit of the charges, the nature of the client's alleged misconduct with particular attention to its violence, the involvement of victims and the existence of mitigating circumstances, the previous history, the mental and emotional condition of the client, and the availability of resources within the juvenile justice system for the juvenile's treatment and rehabilitation. Although in some jurisdictions the probation department will ordinarily consider these elements in preparing a pretransfer report, the lawyer should ordinarily conduct an independent investigation. The adequacy of probation studies varies considerably in practice,

Comment, *supra* at 439, and may be affected by preconceived goals. Even where the probation department's report is carefully prepared, an independent inquiry by counsel may uncover other evidence or alternative treatment plans for the client.

Since the respondent's mental condition is always relevant to and sometimes determinative of the appropriateness of transfer, see *Kent v. United States*, 401 F.2d 498 (D.C. Cir. 1968); N.M.S.A. § 13-14-27(A) (4), representation at this stage will frequently demand presentation of expert opinion on the client's behalf. Comment, *supra* at 445. While clinical services may be available at or through the court, the tendency of psychiatrists and psychologists who work frequently with judges and probation officers to adjust their evaluations to the known views of those with whom they deal has been well established. R. Emerson, *Judging Delinquents: Context and Process in Juvenile Court* 259-263 (1969); see commentary to § 9.2(c), *infra*. The lawyer should, therefore, also be prepared to seek appointment of independent psychiatric or psychological witnesses where that course seems warranted. Consultation with an independent expert will provide counsel with knowledge concerning the child and his or her condition which can contribute significantly to effective examination of prosecution evidence and, possibly, a source of qualified rebuttal evidence on the child's behalf. Comment, *supra* at 445.

In addition to their own investigations, lawyers should seek access to any available reports or other material that may or will be brought to the court's attention. Many courts and probation departments will supply those reports or papers as a matter of course. See Skoler & Tenney, "Attorney Representation in Juvenile Court," 4 *J. Fam. L.* 77, 86 (1964). If disclosure is withheld for some reason, an attorney should promptly attempt to invoke formal discovery devices. The lawyer for a juvenile respondent may properly claim a legitimate interest in those records and, since the court may well consider the entire history of a child and all circumstances surrounding the child's offense, all police and social information will usually be material to the transfer decision. *Kent v. United States*, 383 U.S. 541, 562-63 (1966); *Watkins v. United States*, 343 F.2d 278, 280 (D.C. Cir. 1964).

### 8.3 Advising and counseling the client concerning transfer.

Upon learning that transfer will be sought or may be elected, counsel should fully explain the nature of the proceeding and the consequences of transfer to the client and the client's parents. In so doing, counsel may further advise the client concerning participation

**in diagnostic and treatment programs which may provide information material to the transfer decision.**

*Commentary*

Where a respondent may elect transfer on his or her own motion, or as soon as it becomes apparent that a practical risk of transfer exists, counsel should advise the client of the nature of the transfer proceeding and the consequences associated with retention or relinquishment of juvenile court jurisdiction. In some cases, waiver may result in a lesser penalty than is likely within the juvenile court; in others, the probable criminal sanction is greater than measures the juvenile court could impose. Moreover, the child and the parents will usually not know of limitations on access to and use of juvenile court information, the availability of sealing provisions, or the specific disadvantages of a criminal felony record. These and other circumstances should be called to the attention of the client so that respondent may make an informed decision concerning election of criminal treatment, in those jurisdictions where that option exists, or whether to oppose state- or court-initiated action to transfer jurisdiction. This decision is ultimately the client's responsibility, for the reasons set forth in section 5.2, *supra*.

The lawyer should also counsel the client regarding utilization of diagnostic and treatment services when the possibility of mental or emotional difficulty suggests itself. As the previous sections indicate, evidence tending to identify such conditions and demonstrating their amenability to nonpenal treatment is always material to and may be conclusive on the question of transfer.

**8.4 Transfer hearings.**

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

*Commentary*

In most significant respects, the attorney's role at a transfer hearing is identical to that performed during other juvenile court hearings. Counsel's principal responsibility lies in advocating the client's interests at this stage and, where the latter chooses that course, to present by all fair and honorable means every defense to waiver available under the law. The proposition—sometimes advanced for transfer as well as adjudicative hearings—that lawyers should ordinarily confine themselves to a cooperative or noncontentious approach to

representation is as unacceptable here as at other stages of the juvenile court process. Indeed, the Supreme Court expressly considered and rejected a similar suggestion in the course of its opinion in *Kent v. United States*:

We do not agree . . . that counsel's role is limited to presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge . . . be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation.

383 U.S. 541, 563 (1966). Since it is usually the case that techniques of proof, cross-examination, rebuttal and argumentation employed in contested adjudicative and dispositional hearings will be appropriate to transfer proceedings, the conduct of counsel should be governed by the same standards.

#### 8.5 Posthearing remedies.

If transfer for criminal prosecution is ordered, the lawyer should act promptly to preserve an appeal from that order and should be prepared to make any appropriate motions for posttransfer relief.

#### *Commentary*

Forms of posttransfer relief vary substantially among jurisdictions. In some, the validity of transfer may be attacked only before the criminal court by, for example, motion to quash the information or indictment. Appeal must await trial, conviction and sentencing as in any other criminal matter. Other states allow direct appeal from the transfer order, viewing it either as a final order or as an appealable interlocutory judgment, or make other remedies such as prohibition available. A motion for rehearing by the responsible official may also be available. In any case, the attorney should be prepared to take any steps necessary to seek posttransfer relief and to preserve avenues of appellate challenge to that judgment.



## PART IX. DISPOSITION

### 9.1 In general.

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

#### *Commentary*

It is a truism to say that disposition is for many respondents the most important phase of juvenile court proceedings. In the great majority of cases, at least one charge is sustained, which vests the judge with almost unlimited discretion to choose among alternatives that may substantially affect the lives of respondents and their families. In most jurisdictions the court may—once an adjudication of delinquency for any offense is entered—invoke a variety of sanctions ranging from dismissal of the matter to commitment to an industrial or training school. *E.g.*, Ill. Rev. Stat. ch. 37, §§ 704(7) and (8), 705-2; N.M.S.A. § 13-14-31; N.Y. Fam. Ct. Act § 756. In child protective proceedings, the court typically enjoys the same breadth of decisional authority: dismissal after finding; suspended judgment; release to the parents with or without probation; and placement in a foster home, with a relative or in an institution or agency responsible for the care of neglected and dependent children. *E.g.*, Calif. Welf. & Inst. Code § 727; N.M.S.A. § 13-14-31; Ill. Rev. Stat. ch. 37, § 705-2; see Comment, "Representation in Child Neglect Cases: Are Parents Neglected?" 4 *Colum. J. L. & Soc. Prob.* 230 (1968). Election among these alternatives bears no necessary relationship to either the nature or frequency of the respondent's misconduct. Official dispositions, it has traditionally been said, should be designed to "suit the individual needs of the accused rather than respond in automatic fashion to the offense that he has allegedly committed. The relating of disposition to individual needs instead of to the offense is a central aspect of the modern *treatment* viewpoint." D. Matza, *Delinquency and Drift* 111-12 (1964). See also National Probation and Parole Association, *Guides for Juvenile Court Judges* 69-84 (1957); R. Emerson, *Judging Delinquents: Context and Process in Juvenile Court* 20-22 (1969).

The discretion of juvenile court judges is not, of course, entirely unbounded. They may not order a disposition prohibited or unauthorized by statute, *e.g.*, *Bordone v. F.*, 33 A.D.2d 890, 307

N.Y.S.2d 527 (1969); *Matter of Krywalski*, 26 A.D.2d 894, 274 N.Y.S.2d 670 (1966), nor may they make a decision against the preponderance of the evidence. N.Y. Fam. Ct. Act. § 745; *Matter of Celli*, 27 A.D.2d 702, 276 N.Y.S.2d 967 (1967). There are, moreover, institutional constraints on dispositional choice; it has been suggested that most courts, while hewing to the theory of individualization, have been forced by the circumstances in which they operate to reinstitutionalize the principle of offense, qualified in some measure by an assessment of family strength on the one hand and of the availability of residential facilities on the other. Matza, *supra* at 124-28. Even with these limitations, however, it is apparent that the range of outcomes facing the respondent and family at disposition is extremely wide and that confident prediction of the result will in many cases be difficult or impossible.

**Significance of Dispositional Choice.** The significance of the dispositional decision cannot be overstated. Some consequences of temporary removal from the home have already been suggested in the commentary to § 6.4, *supra*. Those associated with indefinite commitment or placement are even greater. Disruption of the family by hypothesis occurs, and justifies concern, even though the "family" is not wholly "acceptable" by social service standards or is comprised of children living with grandparents or other relatives rather than with the parents. Removal of children from their "psychological" parents is likely to be as significant as removal from a physical parent. See generally J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (1973). In delinquency matters, commitment often means months or years in an industrial school, under strict regimentation and apart from peers and relatives, at a particularly formative stage of development. *In re Gault*, 387 U.S. 1, 27 (1967). See also *Breed v. Jones*, 421 U.S. 519 (1975). Both children's perceptions of themselves and the way they are perceived by others may be substantially affected by such commitment. In addition, the possibility of transmission of inmate social or moral values, which are often irrelevant to or conflict with those of the community generally, must be considered. See generally E. Goffman, *Asylums* (1961); Sykes & Messinger, "The Inmate Social Code," in N. Johnston, L. Savitz & M. Wolfgang, *The Sociology of Punishment and Correction* 401 (2nd ed. 1962).

The situation of children found in need of supervision is much the same; they are often subject to placement in institutions for delinquents or in facilities with physical and staff characteristics like those for delinquent children. *E.g.*, Calif. Welf. & Inst. Code §§ 730,

777; Ga. Code Ann. § 24-2421. See Ohlin, "Institutions for Pre-delinquent or Delinquent Children," in L. Pappenfort, *Child Caring: Social Policy and the Institution*, 177 *et seq.* (1973). Removal of neglected and dependent children from their homes and decisions concerning their custody or adoption bear no less significance for both parents and children. Long-term discontinuity in the parent- or guardian-child relationship is involved and the consequences for both individual and family development may be grave. See Goldstein, Freud & Solnit, *supra*, *passim*.

This is not to assert that placement outside the family is never necessary or desirable or that such treatment cannot be helpful. There are, certainly, instances in which a controlled environment is necessary to community protection or, perhaps, to rehabilitation of the child; equally surely, there are parents who cannot be trusted to provide adequate and safe care for their children. Moreover, there is some reason to believe that, with proper physical and professional resources, certain children in deprived circumstances may be greatly helped by institutional care. See, *e.g.*, B. Flint, *The Child and the Institution* (1966). What remains true is that dispositional decisions often profoundly affect the lives not only of respondents but of all those in close contact with them; their social importance cannot, therefore, be overlooked by judge, probation staff or legal counsel.

**Counsel at Disposition.** In view of the importance of dispositional decisions and the broad discretion available to the judge in making those decisions, active participation of counsel is demanded here as at adjudication. President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 33 (1967). Indeed, all the reasons which demand provision of counsel to children for adjudicative purposes obtain at this point in the proceeding. The lawyer is peculiarly well suited to assure the integrity of the dispositional process by resisting improper pressures exerted by press or police and by insisting that statutory and constitutional procedures be observed. Most respondents, and particularly those who are young, poor and/or members of a minority group, are unlikely to identify abuses of these kinds or to protect themselves effectively against them. It is equally clear that an attorney's participation is necessary to test the evidence of social workers, probation officers, psychiatrists or psychologists. Children or, in most cases, their parents, are initially at a substantial social disadvantage in dealing with adult professional witnesses or their products, even if they understand the foundation and possible interpretations of an expert opinion. "To ask such respondents to

cross-examine experienced witnesses in a court of law," it has been observed with relation to adjudicative hearings, "is to dignify a form of procedure and nothing more." Schinitsky, "The Role of the Lawyer in Children's Court," 17 *Record of A.B.C. N.Y.* 10, 24 (1962). Similarly, children and, in a number of cases, their families may have difficulty in expressing clearly their own circumstances and plans; counsel will be of value in assisting presentation of their story. Perhaps most important, attorneys can cooperate with court personnel or themselves seek to develop a dispositional arrangement that will avoid the necessity for commitment or removal from the home. The lawyer may assist a client or the client's family in securing social, psychiatric, psychological or educational services of value both for immediate court purposes and for longer-range goals. Finally, an attorney has a counseling role to perform by explaining both the nature and purposes of the disposition proceeding and by helping the client to accept, to the extent possible, the court's disposition orders. See generally Isaacs, "The Lawyer in Juvenile Court," 10 *Crim. L. Q.* 222, 235 (1968); Ferster, Courtless & Snethen, "The Juvenile Justice System: In Search of the Role of Counsel," 39 *Ford. L. Rev.* 375, 398 (1971).

While it has occasionally been suggested that lawyers should limit themselves to areas within their own sphere of professional training, e.g., Greenspun, "Role of the Attorney in Juvenile Court," 18 *Clev.-Mar. L. Rev.* 599, 606 (1969), none of the foregoing duties is outside the range of an attorney's capacity for education. Most of them, indeed, are discharged without special concern in criminal prosecutions or personal injury actions.

There is such a thing as self-education, and . . . the average lawyer does a great deal of that. There are a very few lawyers who try lawsuits who do not . . . have to master a good bit of the knowledge that psychiatrists have, that doctors have, that medical specialists have, even that sociologists have. Many an eminent specialist . . . called as an expert and subject to cross-examination, has perhaps been amazed at the knowledge the trial lawyer has shown in cross-examining.

Proceedings of the Institute of the Family 8 (Duke University, Durham, N.C., 1959), quoted in Johnston, "The Function of Counsel in Juvenile Court," 7 *Osgoode Hall L. J.* 199, 207 (1969). Only active participation in formulation of a treatment plan appears unusual, and it demands no more than translation into the social arena of an enterprise familiar to, for example, commercial lawyers who seek merger or consolidation. And, as the commercial

lawyer may refer the economic aspects of a merger to an expert in that area, so the juvenile court attorney can seek independent professional diagnosis and recommendations in developing the proposed dispositional plan.

## 9.2 Investigation and preparation.

(a) Counsel should be familiar with the dispositional alternatives available to the court, with its procedures and practices at the disposition stage, and with community services that might be useful in the formation of a dispositional plan appropriate to the client's circumstances.

### *Commentary*

The ABA *Standards Relating to Sentencing Alternatives and Procedures* observed with disapproval that

Many [criminal] lawyers view their functions at sentencing to involve superficial incantations of mercy; others merely seek the lightest possible sentence without much concern for the real needs of the defendant. Few, in any event, undertake the type of preparation which the sentencing proceeding calls for, and which is a commonly understood duty at preceding stages of the case.

*Id.* at 245-46. The same lack of diligent preparation may be inferred from observations of juvenile court representation in some courts, e.g., Ferster, Courtless & Snethen, "The Juvenile Justice System: In Search of the Role of Counsel," 39 *Ford L. Rev.* 375, 403 (1971), and is subject to the same condemnation. The responsibilities of counsel described in this part cannot adequately be discharged without thorough and careful investigation of all material circumstances and preparation of recommendations concerning disposition.

As in criminal matters, the indispensable first step in representation at disposition is an educational one: counsel must be familiar with the alternatives formally available to the court and, equally important, with the actual character of those dispositions in light of prevailing conditions. See ABA, *Standards Relating to Sentencing Alternatives and Procedures* § 5.3 (j) and Commentary thereto. Observation studies of juvenile facilities have repeatedly described inadequate staff training, overcrowding, lack of medical and psychiatric services, and inadequate programs for reintegration of the child into the community. See commentary to § 1.7, *supra*. Juvenile correctional programs and facilities often lack resources needed for children with

special problems such as mild mental retardation, emotional disturbance or physical handicaps. Office of Children's Services, *Desperate Situation—Disparate Service* (1973); *Report and Recommendations of the Illinois Youth Commission* (Beto Report) 51-67 (1962). Facilities for neglected and dependent children, or for delinquents not requiring secure treatment, also require realistic appraisal. While placement in a foster home or with a private agency may initially seem attractive, practical experience has sometimes proved such placements less than satisfactory. MacIntyre, "Adolescence, Identity, and Foster Family Care," 17 *Children* 213 (1970); Committee on Mental Health Services Inside and Outside the Family Court in the City of New York, *Juvenile Justice Confounded: Pretensions and Realities of Treatment Services* (1972).

Even for noncustodial dispositions, information regarding current conditions is important. Counsel should be familiar with, for example, the prevailing caseload demands on probation staff and the amount and kind of supervision that can be expected under those circumstances. And, for both residential and nonresidential programs, the attorney should be able to advise the client of the probable as well as the potential duration of the disposition. In most jurisdictions, dispositional orders are indefinite and extend through the child's minority, R. Boches & J. Goldfarb, *California Juvenile Court Practice* 132 (1968) (delinquency and supervision findings); Ill. Rev. Stat. ch. 37, § 705-11; in some, definite time limitations are imposed on such judgments. *E.g.*, N.M.S.A. § 13-14-35; N.Y. Fam. Ct. Act § 756. In either case, it may be unusual for a variety of reasons actually to hold the child for the legally allowable time. Often, indefinite commitments result in release within six months or a year. See, *e.g.*, Boches & Goldfarb, *supra* Appendix C. There may also exist administrative devices by which return to the community can be expedited.

An attorney engaged in juvenile court representation should also be familiar with services and resources within and, to the extent possible, outside the community. It is generally agreed that removal from the home is a step to be avoided as far as possible, and location of nonresidential counseling or treatment services may provide the only acceptable alternative to placement or commitment. Inquiry into private and public placement alternatives may also be useful, particularly in the case of children with emotional, physical or educational problems. The lawyer's investigation of such programs should, however, be as careful and realistic as in the case of state rehabilitative and correctional facilities; without care, counsel cannot accurately advise either the client or the court with regard to the alternative treatment plan.

9.2(b)

The lawyer should promptly investigate all sources of evidence including any reports or other information that will be brought to the court's attention and interview all witnesses material to the disposition decision.

(i) If access to social investigation, psychological, psychiatric or other reports or information is not provided voluntarily or promptly, counsel should be prepared to seek their disclosure and time to study them through formal measures.

(ii) Whether or not social and other reports are readily available, the lawyer has a duty independently to investigate the client's circumstances, including such factors as previous history, family relations, economic condition and any other information relevant to disposition.

*Commentary*

In most cases, the social investigation and any psychological or psychiatric reports, together with the evidence adduced at adjudication, constitute the evidentiary basis for a dispositional decision. The former typically contain a broad range of information concerning respondents, their families and their circumstances. See, e.g., H. Lou, *Juvenile Courts in the United States* 116 (1927); Cohn, "Criteria for the Probation Officer's Recommendations to the Juvenile Court Judge," 9 *Crime & Delinq.* 262 (1963). While judicial reliance on recommendations in social and psychiatric reports varies, the weight accorded their factual statements and, in many cases, their conclusions is often considerable. See *Kent v. United States*, 383 U.S. 541, 547, 566-68 (1966). It is therefore desirable that the lawyer obtain advance access to all reports that will be brought to the court's attention so that he or she may consult with the client and the client's family, investigate the circumstances described, secure whatever rebuttal evidence is appropriate and subpoena witnesses. New York Legal Aid Society, *Manual for New Attorneys* 181 (1971).

In many jurisdictions, unfortunately, that opportunity is lacking, either because of personal or institutional reluctance or through pressure of time. In any case, counsel must be prepared to invoke all available procedural remedies in order to prepare for disposition. On the one hand, motions for discovery, with supporting memoranda of law, may be required. Weiss, "Defense of a Juvenile Court Case," in R. Cipes, *Criminal Defense Techniques* § 60.08. When the reports simply are not prepared until immediately before the hearing, coun-

sel may find it necessary to request a continuance, at least in order to confer with the client and the client's family, and, in some cases, until further investigations can be completed. In the first instance, merely "passing" the case may be sufficient. In the second, resetting of the hearing will usually be involved, to which the court and witnesses may express reluctance. See *Manual for New Attorneys, supra* at 181. Despite the discomfort and inconvenience such a request can occasion, a lawyer's professional responsibility demands the seeking of an adjournment whenever counsel in good faith believes further investigation is necessary to assure the reliability of evidence before the court.

The attorney's duty to investigate and prepare for disposition is, however, begun and not concluded upon receipt of social investigation or other reports concerning the client or the client's family. Like the criminal defense advocate, a juvenile court lawyer's duty "at a minimum involves verification of the essential bases of the report and amplification at the sentencing proceeding of parts which seem to be inadequate. The attorney should also take proper steps to controvert any inaccuracies in the report." ABA, *Standards Relating to Sentencing Alternatives and Procedures* § 5.3(f) (iii) (A). A variety of sources of information are used in preparation of social reports and psychiatric evaluations (which may depend to a considerable extent on the social worker's investigation): police records; school records; and interviews with neighbors, relatives, peers, school personnel, past and present employers, and other social agencies. Lou, *supra* at 116-17. The reliability of certain of the information is subject to doubt. For example, a police report often includes a list of "station" or "community" adjustments which imply that guilt is clear but informal action appeared sufficient to the officer on the scene. In many instances, however, the same notation reflects discovery that the child is innocent or that little evidence of wrongdoing exists. Thus, what at first seems to be a "break" for the respondent may, on investigation, turn out to be an arrest on suspicion later proved groundless, or one that was occasioned by the child's demeanor rather than evidence of wrongdoing. Teitelbaum, "The Use of Social Investigation Reports in Juvenile Court Adjudications," 7 *J. Fam. L.* 425, 435 (1967). See President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 167 (1967). The same may be true of school reports. Teitelbaum, *supra* at 435-36. Even cursory inquiry may further reveal that, for one reason or another, there were excusing conditions which did not come to the authority's attention, as in the case of a "truant" child who was



demonstrably ill but failed to provide legitimate evidence of his or her condition to the school attendance officer.

In addition to sources mentioned in social investigation and other reports, the attorney should pursue avenues that might offer rebuttal evidence or an affirmative alternative treatment plan for the client. Persons and community agencies willing to provide assistance should be personally interviewed, both for purposes of preparing them to testify and in order to determine the help they can in fact give. It is usually important for counsel also to visit the home of the client and discuss matters with the family; without firsthand knowledge of the home, counsel will be unable to evaluate and examine the evidence of others relating to home and family conditions or usefully to participate in dispositional counseling.

**9.2(c)**

**The lawyer should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel needed for purposes of evaluation, consultation or testimony with respect to formation of a dispositional plan.**

*Commentary*

In some cases, the lawyer will conclude that a client's statements or behavior suggest the need for psychiatric, psychological, medical or other expert evaluation so that counsel may have an informed position at disposition. Authorization for such examinations is commonly found in juvenile court legislation, although their availability in practice is less easily determined. Many urban courts have their own clinical staffs and services; in other jurisdictions testing and evaluation is available only through a court-appointed expert or temporary commitment to a state facility for diagnostic purposes.

The attorney may view sole reliance on these facilities as undesirable in a variety of circumstances. Temporary referral to a residential diagnostic facility may continue for a substantial period of time (sixty or ninety days) and in some jurisdictions involves placement in the state industrial school or hospital for the criminally insane. Moreover, court-affiliated services in many cases formulate recommendations according to resources thought available rather than setting forth the treatment of choice. Ferster, Courtless & Snethen, "Pre-Dispositional Data, Role of Counsel, and Decisions in a Juvenile Court," 7 *Law & Soc. Rev.* 195, 207 (1971). Psychiatrists and psychologists who work frequently and intimately with judges and probation officers may also tend to adjust their recommendation to

the known views or wishes of those with whom they deal. R. Emerson, *Judging Delinquents: Context and Process in Juvenile Court* 263 (1969).

In any of these circumstances, independent outpatient testing and evaluation may seem important or even necessary; indeed, it can responsibly be urged that in every case an independent evaluation is essential. New York Legal Aid Society, *Manual for New Attorneys* 186 (1971). It is also true that few lawyers or agencies have available the financial resources to provide blanket services of this kind. However, despite these limits, counsel should consider independent evaluation and, when that seems indicated, pursue all available avenues to secure appointment of or guarantee of reimbursement for an independent expert.

The attorney should also be alert to unnecessary or abusive resort to residential diagnostic commitment. This procedure is legitimately used only to gather information for disposition, and its employment as a form of "short, sharp, shock" treatment should be vigorously opposed.

### 9.3 Counseling prior to disposition.

(a) The lawyer should explain to the client the nature of the disposition hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.

#### *Commentary*

In a real sense, disposition epitomizes the "individualization" of justice which juvenile court theory has traditionally emphasized. Because apparently "like" cases (*e.g.*, co-respondents charged with a single offense) may not receive identical dispositions, the more severely treated respondents (and their families) may perceive the order and the court as unfair or prejudiced. See D. Matza, *Delinquency and Drift* 132 *et seq.* (1964). It is particularly important for counsel to advise children and their parents of the factors which are salient in choosing among dispositional alternatives and the nature of those alternatives. A client on probation prior to the

latest adjudication should be aware, for example, that the judge may conclude that a "more controlled environment" is necessary for rehabilitation, whereas the same conclusion may not be reached for a co-respondent with no previous court experience.

Counsel should further explain to clients and their families the nature and specific characteristics of any disposition plan proposed by counsel or by probation staff. If release on probation or other condition is contemplated, a client should be advised of the meaning of such limitations on his or her freedom and of the consequences associated with failure to comply with the conditions of release. Where removal from the home is involved, a client must be made aware of the characteristics of the institution or placement location. In describing that alternative, the lawyer must tread a difficult line between candor and destructive pessimism. On the one hand, counsel cannot avoid the duty to provide a client with realistic information concerning programs to which the client may be subject; certainly, representation of a secure industrial school as "summer camp" ought to be avoided. On the other hand, counsel must anticipate the adoption of a proposed commitment or placement plan and should not needlessly heighten the client's fear regarding that result. An attorney's description of an institution to a client as a "hell-hole" prior to disposition will in all probability make impossible constructive adaptation by the juvenile client to the dispositional program and, by so doing, render both the client and the juvenile justice system a grave disservice.

To the extent possible, the lawyer should further explain to the client, and in appropriate cases the client's family, the reasons for any dispositional plan recommended either by court personnel or by counsel. In so doing, however, counsel may properly consider the possibility that certain information may affect adversely the client's well-being or relationships within his or her family. See § 9.3(c), *infra*. Where such effects are anticipated and disclosure of all the reasons for a given disposition plan is unnecessary to adequate counseling, the attorney is entitled to exercise discretion in relating the premises of a treatment program.

The lawyer should promptly investigate possible dispositional arrangements, both alone and in cooperation with probation or social services, but should not ordinarily make or agree to a specific dispositional recommendation without the client's informed consent. The role of counsel at disposition is essentially the same as at earlier stages of the proceeding: to advocate, within the bounds of the law, the best outcome available under the circumstances according to the client's view of the matter. See New York Legal Aid Society, *Manual*

for *New Attorneys* 178 (1971). In this, the present standard follows the view taken by the criminal justice standards with regard to sentencing:

[I]t is not the lawyer's function to decide what is the best disposition for his client. The lawyer is a representative and an advisor, and when he suggests that a special disposition is desirable, he ought to be doing so with the consent of his client.

ABA, *Standards Relating to Sentencing Alternatives and Procedures* 251-52. See also *id.* at 247-48. Counsel may, of course, appropriately advise a client with respect to community or correctional-therapeutic services that may be of long-term benefit; where circumstances warrant, counsel may also urge the client to accept these services or programs as part of a dispositional plan. Discharge of this counseling function must, however, be distinguished from the actual decision, which is for the client to make. Once full advice is given, the lawyer's own opinion of the client's needs or interests is subordinated to the client's definition of those interests, and the lawyer-client relationship generally demands that counsel advocate the client's desires as strenuously as possible. See §§ 3.1(b) and 5.2, *supra*.

Two sources of limitations on the attorney's duty in this regard should be mentioned. It has often been said that the lawyer's responsibility to urge the client's view at sentencing or disposition is subject to certain "practical" or "realistic" limitations, *Manual for New Attorneys, supra* at 179. The ABA *Standards Relating to Sentencing Alternatives and Procedures* locate a basis for such limitations in general prohibitions against fraud in the court. Just as the duty to make the "best possible defense" for a client at trial does not include the knowing use of perjured testimony, "by analogy . . . [t]he lawyer should not be expected to argue probation for a rape-murder by a sixth offender by submitting that his record is clean and the offense only minor." *Id.* at 247. It is, of course, entirely true that the ethical duty not to misrepresent factual propositions extends to disposition; presenting a legally available dispositional alternative absent such misrepresentation cannot, however, be analogized to fraud on the court. A lawyer is not free to substitute a recommendation of a prison term for the client's expressed wish for probation, even if the lawyer is persuaded that an argument for probation will be rejected and, indeed, may ultimately work to the client's disadvantage. If the respondent insists on presenting an "unwise" dispositional recommendation, the attorney's only

proper alternatives are to advocate the client's interests or, if allowable under the rules of withdrawal, sever all connections with the case. The latter course is, however, of limited availability, and should not be sought at this late stage in the proceedings except in the most extreme circumstances.

A more justifiable limitation on deference to the client's dispositional choice exists in the case of children unable rationally to choose among the available alternatives. In representing such children in neglect or dependency proceedings, attorneys may appropriately decline to offer or support a particular dispositional plan and limit their activity, as at adjudication, to presentation and examination of material evidence, including the wishes of their clients. Where a neutral position cannot be adopted, the principles set forth in section 3.1(b) (ii) (c) respecting determination of the client's interests should generally apply to decisions regarding dispositional alternatives.

### 9.3(b)

**When psychological or psychiatric evaluations are ordered by the court or arranged by counsel prior to disposition, the lawyer should explain the nature of the procedure to the client and encourage the client's cooperation with the person or persons administering the diagnostic procedure.**

#### *Commentary*

When predisposition psychiatric or psychological examinations are to be conducted, whether pursuant to court order or other arrangement, the lawyer should explain as clearly as possible the nature of the procedures to be used. It is essential to accurate psychiatric evaluation, for example, that the psychiatrist have the confidence and candid cooperation of the patient. In many instances, juveniles go to the interview apprehensive of the procedure and distrustful of the doctor. R. Emerson, *Judging Delinquents: Context and Process in the Juvenile Court* 251-258 (1969); Ferster, Courtless & Sneathen, "Pre-dispositional Data, Role of Counsel, and Decisions in a Juvenile Court," 7 *Law & Soc. Rev.* 195, 200-01 (1971). Giving advice in this respect is often difficult. On the one hand, the attorney is bound to inform a client of the uses to which the psychological or other evaluations may be put, including whether the client's confidences may be disclosed. At the same time, counsel should seek to relieve the client's fears and, unless the legality of the diagnostic order is subject to challenge, encourage cooperation with personnel involved

in the evaluative process. Nothing useful is gained by frustrating careful evaluation of the child or the child's parents once such evaluation is lawfully undertaken; in addition, the client is likely to be disadvantaged in the result by an appearance of uncooperativeness or resentment and by flippant responses in the face of a "serious" problem.

Hostile behavior in contacts with the clinic directly discourages favorable consideration of the case by clinic personnel. On the other hand, such behavior forces clinic staff to rely on strategies to circumvent this lack of cooperation that tend to perpetuate prior discrediting definitions of character and disadvantageous programs of action.

Emerson, *supra* at 257. An opportunity for developing useful dispositional plans and for mitigating unfavorable social investigation information may thereby be lost.

9.3(c)

The lawyer must exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or, if the client is a juvenile, the history or condition of the client's parents. In general, the lawyer should not disclose data or conclusions contained in such reports to the extent that, in the lawyer's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

*Commentary*

It has already been observed that the lawyer must have access to social investigation and other reports in order adequately to prepare for and participate at disposition. § 9.2, *supra*. As with other evidence, it would as a matter of strategy be desirable to discuss the contents of these records with the client and, perhaps, with members of the family. These records may contain or be premised on statements regarding behavior which should be investigated, and such preparation would ordinarily begin with the client. On the other hand, these reports often contain information that would, if known by the client, create substantial risks of harm. The opinion of a psychologist that a child is "mentally retarded" may seriously affect that child's self perception and consequent behavior. Exposure to

the opinions of teachers, peers or parents that one is "delinquent" or "uncontrollable" may become a self-fulfilling prophecy; children so labeled will in some cases conform their behavior to the expressed expectations of others, perpetuating or even creating undesirable roles for themselves. See Payne, "Negative Labels—Passageways and Prisons," 19 *Crime & Delinq.* 33, 34-37 (1973); Reed, *Disclosure of Social Histories to Juveniles—A Social Perspective* (Manuscript prepared for Juvenile Justice Standards Project, January 6, 1974).

Other kinds of information typically included in predispositional reports may also disserve children. The revelation, for example, that a child is illegitimate may occasion emotional difficulty, as could the knowledge that his or her social father is not the biological father. Reed, *supra* at 3. In some cases, transmission of such information can seriously disrupt relationships within the family. Relationships with social workers can also adversely be affected through disclosure of the contents of a social report; the expressed view of a probation officer that a child or parent is "beyond help" will predictably result in antagonism which in turn prejudices any future contacts between client and worker. The tension between need to investigate the contents of social, psychological, psychiatric and other reports and intelligent concern for the consequences of revealing their contents to clients or their families cannot be denied or avoided. Counsel's responsibility to a client requires that preparation for disposition not be abandoned; consequently, whenever consultation is indispensable to discharge of a lawyer's professional duty, counsel must confer and accept the risks attendant upon disclosure of sensitive information. On the other hand, in many and probably most situations counsel can, perhaps with less convenience, investigate the factual and expert statements contained in reports without need for full disclosure of potentially damaging material to the client. Where this is possible, the lawyer may properly, and often should, refrain from disclosing data or conclusions that seem likely, based on knowledge of the client and his or her family, to harm either a client's well-being or any relationship with a member of the family. If the attorney is in doubt concerning the potential effect of revelation on clients or their families, the attorney may of course seek expert advice on that question.

#### 9.4 Disposition hearing.

(a) It is the lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.

(i) Where the dispositional hearing is not separate from adjudication or where the court does not have before it all evidence required by statute, rules of court or the circumstances of the case, the lawyer should seek a continuance until such evidence can be presented if to do so would serve the client's interests.

(ii) The lawyer at disposition should be free to examine fully and to impeach any witness whose evidence is damaging to the client's interests and to challenge the accuracy, credibility and weight of any reports, written statements or other evidence before the court. The lawyer should not knowingly limit or forego examination or contradiction by proof of any witness, including a social worker or probation department officer, when failure to examine fully will prejudice the client's interests. Counsel may seek to compel the presence of witnesses whose statements of fact or opinion are before the court or the production of other evidence on which conclusions of fact presented at disposition are based.

#### *Commentary*

Dispositional hearings are typically marked by broad discretion, in procedural and evidentiary terms as well as in the range of decisional alternatives. Rules of proof applicable to adjudication are usually relaxed and all evidence that is "material and relevant" to the issues at disposition may be received at that stage, even though incompetent if offered at adjudication. *E.g.*, Ill. Rev. Stat. ch. 37, § 705-1; Minn. Rules of Court, Rules of Procedure for Juvenile Court Proceedings, Rule 6.5; N.Y. Fam. Ct. Act § 745. This is not to say, however, that procedure and evidence have no important place at disposition. Summary proceedings cannot be and are not tolerated. See Dorsen & Reznick, "*In re Gault* and The Future of Juvenile Law," 1 *Fam. L.J.* 1, 42 (no. 4, 1967). Failure to allow cross-examination of evidence offered at disposition has been held error, *In re Rosmis*, 26 Ill.App.2d 226, 167 N.E.2d 826 (1960); *cf. Specht v. Patterson*, 386 U.S. 605 (1967), as has refusal to hear statements by interested parties on the respondent's behalf, *In re P.*, 27 A.D.2d 522, 275 N.Y.S.2d 449 (1966). While statutory and court rules differ widely from jurisdiction to jurisdiction, no code does—or, consistent with due process, can—entirely insulate the dispositional stage from basic requirements of procedural regularity or, in all likelihood, effectively deny the opportunity to present relevant evidence at that stage. See *Specht v. Patterson*, 386 U.S. 605 (1967); S. Fox, *Juvenile Courts in a Nutshell* 201-02 (1971).



It is frequently important that the dispositional hearing not immediately follow adjudication. Without an adjournment, preparation is often handicapped; moreover, social investigation or other reports will often not be prepared until an adjudication has been made. Counsel should seek to assure that all relevant evidence is before the court and that required procedural steps (such as preparation of a social report in some jurisdictions) have been taken. See New York Legal Aid Society, *Manual for New Attorneys* 181-89 (1971).

In addition to assuring that reports and witnesses are produced as a foundation for disposition, the lawyer is also responsible for examining the reliability of any proffered evidence which may reasonably be subject to challenge. The "informality" characteristic of juvenile disposition hearings sometimes militates against discharge of this duty. Judges have on occasion or even routinely sought to protect their probation officers from vigorous cross-examination and impeachment. This strategy was expressly considered and rejected for transfer proceedings in *Kent v. United States*, 383 U.S. 541, 563 (1966). See commentary to § 8.4, *supra*.

The same principle governs counsel's conduct of disposition hearings in delinquency, supervision or child protective proceedings. Counsel may not, consistent with his or her responsibility to the client, knowingly limit or forego examination of any witness—including a social worker or probation department officer—when such failure to examine fully will prejudice the client's interests. Similarly, counsel is bound to object to the introduction of any evidence that he or she believes misleading or inaccurate and should seek to controvert such evidence if it is admitted and is likely to prejudice the client's interests. When, for example, a probation officer's report includes statements of fact or opinion, counsel may examine the probation officer with respect to the source of those statements, the knowledge and bias of the original declarant, and any other matter affecting the reliability of the evidence and the credibility of its source. Counsel may also seek to compel the presence of witnesses whose statements are brought before the court at disposition and the production of other evidence on which material conclusions are based. By these efforts, an attorney can sometimes show that a long "police record" is not so significant as may appear on its face or that reports from neighbors are more expressions of community or personal bias than accurate statements of fact. See *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932).

Facts and conclusions derived from firsthand observation and evaluation by expert witnesses are no more immune from inquiry

and challenge. Psychiatric or psychological diagnoses, particularly in understaffed clinical services departments, may be based on interviews that are briefer than professional standards recommend and on inappropriate testing instruments. See Teitelbaum, "The Use of Social Investigation Reports in Juvenile Court Adjudications," 7 *J. Fam. L.* 425, 436 (1967). In some cases, the objectivity of the diagnosis may also responsibly be questioned. See R. Emerson, *Judging Delinquents: Context and Process in the Juvenile Court* 257-58 (1969); Diana, "The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures," 47 *J. Crim. L., C. & P.S.* 561, 565 (1957). Probation officers, and procedures used by these officers, similarly are not an undifferentiated class; some are better trained, more conscientious and more familiar with relevant local conditions than others. Accordingly, the lawyer must be free and prepared to examine, as closely as the circumstances justify, officers' qualifications, the frequency and nature of their contacts with clients and their families, and any other matters bearing on the reliability of the evidence and conclusions they place before the court. Unwarranted or *ad hominem* attacks on court experts are not, of course, proper. Witnesses at disposition are entitled to the same fairness and consideration as at any other stage of the proceedings; they are not, however, entitled to immunity from appropriate examination or contradiction.

9.4(b)

The lawyer may, during disposition, ask that the client be excused during presentation of evidence when, in counsel's judgment, exposure to a particular item of evidence would adversely affect the well-being of the client or the client's relationship with his or her family, and the client's presence is not necessary to protecting his or her interests in the proceeding.

*Commentary*

It was observed earlier that exposure to certain kinds of dispositional information may adversely affect the emotional well-being of children or their relationships within their families. § 9.3(c). When it appears that such harm will result from evidence presented at disposition and the presence of the children or members of their families is unnecessary to protection of the former's interests in the proceeding, counsel may appropriately ask the court to excuse them during the presentation of such evidence. This may arise, for example, where unimpeachable psychological or social information is put

before the court; the potential for injury to a client is apparent and there is nothing that the client can contribute to contradiction or interpretation of the evidence.

#### 9.5 Counseling after disposition.

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

#### *Commentary*

It is widely accepted that the lawyer can perform a valuable service in explaining the meaning of a dispositional order and conveying to the client the importance of accepting and cooperating in the dispositional plan. McKesson, "Right to Counsel in Juvenile Proceedings," 45 *Minn. L. Rev.* 843, 851 (1961); Comment, "The Attorney and the Dispositional Process," 12 *St. Louis U.L.J.* 644, 654-55 (1968). There are both informational and counseling aspects to this function. If the attorney has fully advised the client and family prior to disposition, they will be aware of the general nature and obligations of the alternatives available to the court. Even with such advice, however, the meaning of the dispositional order actually entered may not be clear to all concerned. Terms such as "deferred disposition," "suspended commitment" or "release on probation" are unfamiliar to most juvenile clientele and the lawyer should take time to explain their operational significance. It is of particular importance that counsel also set out clearly and carefully the content of any conditions of release or suspension of disposition or commitment which may be expressly incorporated into the order, customary in the jurisdiction, or implicit in release under supervision. Counsel may not safely rely on others to do so in sufficient detail or with sufficient emphasis, and neither the client nor the client's family must be left to guess at the rules governing the former's conduct. In giving such an explanation, the lawyer should also make clear the potential consequences of good or bad behavior in light of the order actually entered. The probability that subsequent wrongdoing—including conduct that may seem trivial to the probationer—will result in commitment to an institution must be

conveyed, as should the possibility of avoidance or vacation of a jurisdictional finding if the child has no further difficulty with the law.

In addition to informing clients and their families of the meaning and consequences of specific dispositional orders, the lawyer should encourage acceptance of those orders by all concerned, at least until an order is successfully challenged by motion or on appeal. If removal from the home is involved, counsel should emphasize the benefits that may accompany placement; if supervised release has been imposed, the importance and value of cooperating with a trained and experienced probation officer should be stressed. A negative or disinterested attitude toward the dispositional plan may, to the client's distinct disadvantage, undermine its effectiveness from the outset; affirmative expressions of opinion concerning the plan by an adult clearly associated with the client's interests may ease both transition to the new status and rehabilitation under it. In this connection, it is also appropriate for the lawyer to point out the disadvantages consequent on refusal to cooperate with a dispositional order, including transfer to a less desirable institution, a longer period of institutionalization or probation, or termination of conditional liberty in favor of stronger measures.

Counseling after disposition should not be reserved for those cases where no appeal is contemplated. In many cases, a stay of execution or release pending appeal is unavailable. Moreover, if the appeal is unsuccessful, commitment or release on condition will still be imposed, and undue anxiety concerning the future may be in some degree reduced if children and their parents have been prepared for that eventuality in as positive a fashion as possible.

## PART X. REPRESENTATION AFTER DISPOSITION

### 10.1 Relations with the client after disposition.

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

(i) If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.

(ii) Whether or not the charges against the client have been dismissed, where the lawyer is aware that the client or the client's family needs and desires community or other medical, psychiatric, psychological, social or legal services, he or she should render all possible assistance in arranging for such services.

*Commentary*

Entry of a final dispositional order or even dismissal of the proceedings does not automatically terminate the client's need for an attorney's professional services. See ABA, *Standards Relating to the Defense Function* §§ 8.2, 8.5 and Commentaries thereto; ABA, *Standards Relating to Post-Conviction Remedies* § 4.4 and Commentary. After a client has been found responsible for the acts or conditions alleged and made subject to a dispositional order, the lawyer should be open to further contact with both the client and the agency or institution involved in the disposition plan. Where the initial disposition contemplates periodic review of the order entered, familiarity with the client's behavior and treatment is important to representation upon review. Counsel may also be able to render useful service when choice of placement alternatives or course of treatment is reserved for or subject to change by a correctional authority, or where revocation of conditional liberty is sought. For these purposes, as well, it is important that the trial attorney remain accessible to both client and agency. The position taken here largely follows that adopted by the *Report on Legal Representation of Indigents in the Family Court Within the City of New York*, which recommended that:

In all instances of representation of children in the Family Court, where the disposition has been placement or commitment away from the child's home, the agency or attorney should continue active legal involvement and communication with such child. . . . In juvenile cases involving placement, an attorney's responsibility to the child should not end with the order of disposition. His role corresponds to that of an attorney whose adult client has been sentenced to prison.

*Id.* at 36-37.

Even where the petition has been dismissed, both advocacy and counseling functions may remain for the attorney. Records concerning the child's involvement with the law are usually maintained and may be more or less accessible to prospective employers, the armed services, educational institutions or other law enforcement agencies. E. Lemert, "Records in the Juvenile Court," in S. Wheeler, *On*

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*Record: Files and Dossiers in American Life* 355 (1969). There is a considerable body of evidence suggesting that such information, even when known to have resulted in acquittal, is disadvantageous to the client in, for example, seeking employment. Schwartz & Skolnick, "Two Studies of Legal Stigma," 10 *Soc. Problems* 133 (1962). An action to expunge the record or the client's name should therefore be considered by counsel. See *In re Smith*, 63 Misc.2d 198, 310 N.Y.S.2d 617 (1970). Schantz, "Relieving the Stigma of Arrest and Conviction Records," in R. Cipes, *Criminal Defense Techniques* ch. 42 (1974). In addition, the lawyer should advise the client what to say if asked about the existence of an arrest or court record. *E.g.*, *T.N.G. v. Superior Court*, 4 Cal.3rd 767, 484 P.2d 981 (1971) (interpreting statute to authorize juvenile to deny that he had been arrested, detained or otherwise subjected to juvenile proceedings).

There may also be a need for nonlegal counseling quite apart from the outcome of specific legal proceedings. When an attorney has become aware that the client or the client's family needs and desires medical, psychiatric, psychological or social services, he or she should render all possible assistance in locating and arranging for delivery of these services. Such activity may be supplemental to the court-ordered dispositional plan or may be pursued even where all legal charges have been dismissed. After disposition, as at earlier stages of representation, the counseling functions should be considered independent of the posture taken during or results of the juvenile court proceeding itself. See § 5.3, *supra*.

10.1(b)

The decision to pursue an available claim for postdispositional relief from judicial and correctional or other administrative determinations related to juvenile court proceedings, including appeal, habeas corpus or an action to protect the client's right to treatment, is ordinarily the client's responsibility after full consultation with counsel.

*Commentary*

In other sections of these standards, responsibility for basic decisions concerning the posture to be adopted in juvenile court proceedings has expressly been allocated to the client. §§ 3.1, 5.2, *supra*. The same principle generally governs a decision to seek postdispositional relief from judicial or administrative determinations arising out of juvenile court proceedings. Counsel has, of

course, the responsibility fully to advise the respondent concerning the legal merit of the action contemplated and should further advise him or her concerning all foreseeable advantages or disadvantages that may be consequent upon prosecution of the appeal or other proceeding. ABA, *Standards Relating to Criminal Appeals* § 2.2(a) and Commentary thereto; ABA, *Standards Relating to Post-Conviction Remedies* § 4.4 and Commentary; ABA, *Standards Relating to the Defense Function* § 8.5(a) and Commentary thereto. Having done so, the lawyer must, in most cases, leave the final balancing of costs and benefits to the client.

The rule of client determination cannot, however, usefully be invoked where the client is too young or immature to exercise reasoned judgment concerning prosecution of postdispositional remedies. In these cases, the principles set forth in section 3.1(b) (ii), *supra*, should generally apply to such decisions.

#### 10.2 Postdispositional hearings before the juvenile court.

(a) The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.

##### *Commentary*

Juvenile court proceedings are frequently subject to hearings or motions to review or modify adjudicative and dispositional decrees. In some instances, subsequent review is expressly contemplated by the nature of the order itself or by statute. If the court employs a continuance under supervision or other form of deferred adjudication, the respondent ordinarily will be required to appear at a later date for final resolution of the action. *E.g.*, Ill. Rev. Stat. ch. 37, § 704-7; N.M.S.A. § 13-14-33; N.Y. Fam. Ct. Act § 749. A number of state laws also provide for routine review of dispositional orders in delinquency, supervision, neglect and dependency proceedings. *E.g.*, Ill. Rev. Stat. ch. 37, § 705-8 (2); Iowa Code Ann. tit. 11, § 232.36; Minn. Rules of Procedure for Juvenile Court Proceedings, Rule 6-7 (2) and (3). Other jurisdictions create a similar procedure by limiting the duration of commitment, placement, foster home and/or probation orders and requiring the responsible party to file a petition if extension of the term is sought. *E.g.*, N.Y. Fam. Ct. Act § 756(b) (eighteen months limit on commit-

ment to state institution, subject to extension), § 757(b) (two year limit on probation, subject to extension); N.D.C.C. § 27-20-36 (two year limit on any dispositional order, subject to extension); N.M.S.A. § 13-14-35 (one year limit on commitment, subject to extension).

Hearings of this sort are best viewed as extensions of the original disposition and the lawyer who represented the client initially should ordinarily accept responsibility for representation at these stages. Investigation and preparation for adjudication and disposition will have made counsel uniquely familiar with the respondent and his or her circumstances and, therefore, best prepared to discover, present and examine evidence relating to change in the existing decree. Refusal to continue legal assistance at this point may, concomitantly, prejudice the client's position significantly upon review. It is, of course, true that in some cases probation officers will appear with respondents, but their participation cannot adequately replace the participation of counsel even in those cases where the probation officer is sympathetic to the child's desires. *Cf. In re Gault*, 387 U.S. 1, 36 (1967).

An analogous responsibility arises for trial counsel with respect to provisions for sealing or destroying records produced by the child's contact with the law. Invocation of remedies of this sort can be extremely important to the child. The social disadvantage associated with arrest and court records even without conviction has been described in section 10.1, *supra*. Dissemination of information relating to adjudication and commitment to a state institution is at least as damaging, if not more so. See generally Gough, "The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status," 1966 *Wash. U.L.Q.* 147, 150-162; Mahoney, "The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence," 8 *Law & Soc. Rev.* 583 (1974). There is, as well, reason to believe that persons subject to a disadvantaging record will, for reasons that have not been fully specified, tend to adapt their behavior to the perceptions reflected in that record. McEachern, "The Juvenile Probation System," 11 *Amer. Beh. Sci.* 1 (no. 3, 1968). In many cases, if trial counsel abandons contact with the client upon entry of a final order, the advantages inherent in sealing or destruction may be lost.\*

\*While a few statutes provide for notification of that procedure's availability, Ky. Stat. § 208.275; S.D. Comp. L. § 26-8-57.1; N.M.S.A. § 13-14-43, most do not. Wotruba, *Juvenile Records—Sealing and Expungement* (manuscript prepared for Juvenile Justice Standards Project, January 12, 1974). Moreover,



In addition to later hearings contemplated by or required for orders of the kind entered during the original proceeding, virtually every jurisdiction allows the respondent or a parent to seek modification or vacation of juvenile court orders.\*\* Perhaps even more frequently than in automatic review or sealing proceedings, the assistance of counsel is needed for such actions. Their availability is often unknown to the clientele of the juvenile court, as the paucity of reported cases under these provisions suggests. Moreover, the burden will ordinarily lie on petitioner to establish "good cause" or "change of circumstances." These standards are peculiarly legal in character, having no plain content; counsel will usually be needed to interpret their meaning and develop the case for modification or vacation.

In a sense, proceedings brought to modify or vacate are less inte-

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affirmative action—usually by petition—is typically required to initiate sealing or expungement procedures. *E.g.*, Calif. Welf. & Inst. Code § 781; Idaho Code § 16-1816(A); Utah Code Ann. § 55-10-117; Mass. G. L. Ann. ch. 276, § 100(B); Alaska Stat. § 47.10.090. The assistance of counsel is needed to determine the tolling of the statutory waiting period, which may range from one to five years and may be measured from termination of juvenile court jurisdiction over the respondent, attainment of maturity, release from parole or some other point. Gough, *supra* at 181-85; Wotruba, *supra* at 2-3. Even where the court or probation officer is authorized to take these steps on the respondent's behalf, Colo. Rev. Stat. § 19-1-11; Ky. Stat. § 208.275, counsel's participation is useful in calling attention to the timeliness of undertaking such proceedings.

The child may also be requested to satisfy the court that factual predicates to the granting of relief have been satisfied. Commonly, petitioners must establish that they have not been convicted of serious crime during the interim, nor is an allegation of such crime pending, and that they have been successfully rehabilitated. *E.g.* Ariz. Rev. Stat. § 8-247(A); Colo. Rev. Stat. § 19-1-111; Calif. Welf. & Inst. Code § 781; Ga. Code Ann. § 24A-3504; Idaho Code § 16-1816(A); N.D.C.C. § 27-20-54; Utah Code Ann. § 55-10-117; Vt. Stat. Ann. tit. 13, § 665, Wyo. Stat. § 14-115.42; Ky. Stat. Ann. § 208.275 ("rehabilitation" not included); N.M.S.A. § 13-14-43 ("rehabilitation" not included). Whether, for example, a child has been rehabilitated may present questions of law and fact for which the assistance of counsel—and particularly of an attorney closely familiar with the child, his or her family, and the child's previous and recent history—will be valuable if not indispensable. See Comment, *Inadequacies of the Juvenile Sealing Procedure in California*, 7 Cal. West. L. Rev. 421 (1971).

\*\**E.g.*, Alaska Rules of Juvenile Procedure, Rule 28(b); Calif. Welf. & Inst. Code §§ 775-779; D.C. Code Ency. § 16-2309; Vernon's Ann. Mo. Stat. § 211.251; N.Y. Fam. Ct. Act § 762; N.D.C.C. § 27-20-37. A showing of "good cause," *e.g.*, Alaska Rules § 28(b); N.Y. Fam. Ct. Act § 762, or "change of circumstances," *e.g.*, Calif. Welf. & Inst. Code § 778; N.D.C.C. § 27-30-37, is sometimes required; other statutes set forth no specific standard for a petitioner to modify an adjudicative, dispositional or custodial order. *E.g.*, Ill. Rev. Stat. ch. 37, § 705-8 (Supp. 1974); Iowa Code Ann. §§ 232.33, 232.36; Vernon's Ann. Mo. Stat. § 211.251.

grally related to the original juvenile court proceeding than those involving review clearly contemplated by the initial decree. A change in the circumstances of the family may come about fortuitously or not at all, and the need for further representation may not have been within the attorney's reasonable expectations upon undertaking representation in the first instance. Despite this, counsel may not turn a deaf ear when presented with information indicating grounds for affirmative action. The lawyer most intimately acquainted with the family's circumstances and the reasons for the original judgment is generally best able to provide representation at this stage and should, therefore, be encouraged to continue assistance in efforts by a client to seek relief of this kind. If counsel for some reason can no longer represent the client or family, he or she should at least inform the client that the circumstances described may warrant a petition to modify or vacate, assist in securing services of a lawyer to undertake representation in the matter, and cooperate fully with new counsel when one is located.

**10.2(b)**

**The lawyer should advise the client of the pendency or availability of a postdispositional hearing or proceeding and of its nature, issues and potential consequences. Counsel should urge and, if necessary, seek to facilitate the prompt attendance at any such hearing of the client and of any material witnesses who may be called.**

*Commentary*

It has already been observed that a respondent and his or her family may be unaware of the pendency of hearings contemplated by the original court order or of the availability of affirmative measures of review available under local law. With respect to the former, the lawyer should keep the client and, in most cases, the client's family current with regard to statutory or court-ordered rehearings and the factual and legal issues there involved. With regard to initiation of petitions for modification or vacation, counsel should not only advise clients and their families of the nature and issues of the relief sought, but also of any foreseeable disadvantages that may be associated with bringing such an action. *Cf. ABA, Standards Relating to Post-Conviction Remedies 67.*

If modification or vacation of an order is sought, it will ordinarily be useful or even necessary to have the client present during the hearing. Counsel should seek to assure the attendance of the client and any other witness whose testimony is material. In this and most respects, both counseling and advocacy in postdispositional matters

are subject to the same principles that govern representation at the original disposition hearing. See generally Part IX.

### 10.3 Counsel on appeal.

(a) Trial counsel, whether retained or appointed by the court, should conduct the appeal unless new counsel is substituted by the client or by the appropriate court. Where there exists an adequate pool of competent counsel available for assignment to appeals from juvenile court orders and substitution will not work substantial disadvantage to the client's interests, new counsel may be appointed in place of trial counsel.

#### *Commentary*

It has widely been accepted that, as a general proposition, continued representation by trial counsel through appeal is desirable. His or her familiarity with the issues and proceedings below often places the trial attorney in the best position to perform promptly and accurately the tasks involved in appeal, such as designating the record on appeal and identifying the issues to be raised there. In addition, clients dependent on representation by appointed counsel may suffer a hiatus in service and delay in presentation of the appeal if the lawyer originally assigned is not routinely expected to continue representation on appeal. ABA, *Standards Relating to the Defense Function*, Commentary to § 8.3(a); ABA, *Standards Relating to Criminal Appeals* §§ 2.2(a), 3.2. These points have equal or special force in juvenile court appeals. Supersedeas bond and stays of execution are not frequently available in cases involving children. In view of the fact that commitments in delinquency and supervision matters often last less than one year, the delay usually resulting from substitution of counsel on appeal may end any prospect of securing the client's release prior to completion of the child's custodial term. Moreover, few jurisdictions have available to them an agency or pool of experienced counsel available for regular appointment to juvenile appeals. Accordingly, reliance on the continued representation by trial counsel will be necessary in many states. Therefore, trial counsel should be retained on appeal, unless appellate specialists are available.

At the same time, the disadvantages involved in this method of providing appellate services must candidly be recognized. Perhaps the major disadvantage lies in the failure to present issues involving competence of representation below or to identify errors that might have been but were not raised by motion or objection at trial. It is surely too much to expect trial lawyers thoroughly to

search the record for matters which reflect their own inadequacy. Bazelon, "Defective Assistance of Counsel," 42 *U. Cin. L. Rev.* 1, 24-25 (1973). Equally important, the trial lawyer does not bring a fresh eye to earlier proceedings; the theory of the case or view of the law entertained below will often blind the attorney to errors that might be raised on appeal as an issue of inadequacy of counsel, as manifest error, or on some other ground. Moreover, appellate courts sometime receive complaints of counsel's own incompetence with suspicion. See *Cross v. United States*, 392 F.2d 360, 367 (8th Cir. 1968) (accusing counsel of fabricating a defense for a client who had no other); Bazelon, *supra* at 25. Nor are statutory provisions allowing trial counsel to seek substitution on a showing of "exceptional circumstances"—such as a belief that he or she performed inadequately at trial—an entirely satisfactory remedy for this problem. The same factors that inhibit presentation of the issues on the merits will predictably affect their identification and prosecution at this stage.

It should also be said that the consequences of delay are less serious in cases where custodial disposition has not been ordered or a stay or bond pending appeal has been granted. In these instances, the interests of efficiency which justify a general preference for trial counsel's continued assistance are in substantial measure diminished. And, while it has been suggested that "the advantage of familiarity will generally outweigh any possibility of advantages to be gained in a fresh viewpoint of successor counsel," ABA, *Standards Relating to Providing Defense Services* § 5.2(b) and Commentary, that proposition is doubtful where—as is often true of juvenile cases—trial representation is typically performed by very busy defender staff or young and inexperienced assigned counsel and there is available a designated appellate defender agency (*e.g.*, Ore. Rev. Stat. § 151.250; Wis. Stat. Ann. § 256.67) or an adequate pool of competent appellate counsel. Experienced appellate lawyers have stressed the value of an independent review of the record and some defender agency personnel consulted strongly feel that non-agency review was generally preferable to in-house review even where the agency separated trial and appellate staff.

The second sentence of this standard takes the foregoing circumstances into account by stating a preference for substitution of counsel on appeal in those jurisdictions and in those cases where the benefits of a fresh review of proceedings can be had without substantial disadvantage to the client's interests. The circumstances suggesting appropriateness of new counsel include release of the client on probation or by reason of stay or bond, the ready avail-

ability of appellate legal services, representation by assigned counsel at trial, and the expressed desire or consent of the client to substitution. In order to minimize confusion and de facto abandonment of appellate responsibility, trial counsel is expected to continue active representation until relieved of that responsibility by the client or by the appropriate court.

**10.3(b)**

Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.

*Commentary*

It is the responsibility of trial counsel, whether or not he or she expects to conduct an appeal, to advise the client and, where their interests are not adverse, the parents concerning the meaning and consequences of any appealable order and the availability of appeal. Counsel should also take all steps necessary to ensure that the right to appeal is not lost through indecision or confusion, at least until such time as new counsel is appointed or retained or the client competently decides not to exercise the right to seek review. See ABA, *Standards Relating to Criminal Appeals* § 2.2(a) and Commentary thereto. The importance of discharging this responsibility without relying on substitution of counsel or waiting for a "clear" decision is particularly acute where, as is often true, failure to file the notice of appeal is held fatal to review or postconviction relief. See *In the Interest of R\_\_\_\_, S\_\_\_\_, and T\_\_\_\_*, 362 S.W.2d 642 (Mo. App. 1962); Note, "Attorney's Negligence: The Belated Appeal," 2 *Valparaiso U. L. Rev.* 141 (1967); ABA, *Standards Relating to Criminal Appeals*, Commentary to § 2.1. In view of the costs in terms of loss of liberty, time and inconvenience—if not denial of all opportunity for review, as sometimes occurs—the responsibility of trial counsel to advise clients of and to protect the right to appeal should be forcefully emphasized.

**10.3(c)**

Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal

and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw from a case solely because his or her own analysis indicates that the appeal lacks merit.

*Commentary*

**Advising the Client Concerning Appeal.** It is important that the respondent and, in appropriate cases, the respondent's family be offered counsel's frank professional judgment as to whether meritorious grounds for appeal exist and the probable outcome of an appeal. See ABA, *Standards Relating to the Defense Function* § 8.2 and Commentary thereto; ABA, *Standards Relating to Criminal Appeals* § 2.2. As with advice at earlier stages of proceedings, this should not reflect a hasty impression or a well-intentioned effort to relieve the client's anxiety upon disposition. Even where trial counsel will continue representation through appeal, the lawyer should reserve opinion until thorough review of the record has been completed and all potential issues for appeal have been identified. See *Hardy v. United States*, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring); Bazelon, "Defective Assistance of Counsel," 42 *U. Cin. L. Rev.* 1, 24 (1973). Without careful consideration and investigation of all material circumstances, the attorney will not only be unable to indicate the available grounds for review and their probable success but, perhaps even more important from the client's perspective, cannot describe the relative advantages associated with the available choices.

In addition to pointing up the grounds for appeal, if any, counsel should further advise the client and other concerned persons of the disadvantages that may attend pursuit of an appeal. The possibility in some jurisdiction of receiving a different and what may be in the client's eyes a less desirable disposition after successful appeal and retrial is a familiar instance of matter which must be fully considered. See ABA, *Standards Relating to Criminal Appeals*, Commentary to § 2.3(e).<sup>\*</sup> Counsel should also take into account the place of detention pending appeal and the possibility that seeking a

<sup>\*</sup>While there is little authority on this question in juvenile cases, it is significant that the United States Supreme Court has upheld imposition of a more severe sentence upon retrial, at least where the judge has before him "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *North Carolina v. Pearce*, 395 U.S. 711 (1969). See also *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (upholding rendition of a higher sentence by a jury after retrial).

stay of appeal itself will lengthen or change the nature of the disposition.

In juvenile cases as in other proceedings, the tender of a candid opinion concerning the merits and prospects of appeal is important not only in protecting the client's interests but also in promoting the effective administration of justice. See ABA, *Standards Relating to the Defense Function* 290-91. While avoidance of meritless appeals is difficult where the client has nothing to lose from the attempt, see Hermann, "Frivolous Criminal Appeals," 47 *N.Y.U.L. Rev.* 701 (1972), there is still reason to believe that to the extent counsel can, without overreaching, demonstrate the inutility of seeking review, worthwhile goals of efficiency and economy will be advanced.

**Decision to Appeal and Withdrawal of Counsel.** The decision to appeal, like other decisions going to rights or privileges of the accused, is ultimately for the client. See ABA, *Standards Relating to Criminal Appeals* § 2.2(b). The lawyer's responsibility as a counselor to urge acceptance of a final dispositional order and treatment thereby authorized is subject to his or her duty fully to advise the client of any existing legal right to review. There is no conflict in these duties, properly understood. As in any other case where a stay of execution is not granted pending appeal, counsel should urge cooperation until such time as decision on the appeal is rendered.

Assuming that the decision to seek review is properly allocated to the client, there remains the difficult question of the extent to which counsel on appeal is required to advance arguments which, in counsel's view, have no meritorious basis. This question was given extensive and careful consideration in the criminal justice standards, ABA, *Standards Relating to the Defense Function* 295-302; ABA, *Standards Relating to Criminal Appeals* 75-82, and there is no reason to repeat the analysis there presented. In substantial part, those standards adopted the principles set forth in *Anders v. California*, 386 U.S. 738 (1967), which are helpful in stating what the lawyer on appeal should not and may not do. In the first place, counsel should not lightly reach the threshold conclusion that no meritorious ground for appeal exists; in addition to examining prevailing authority, counsel should consider whether sound argument for change in the law can be made even when the existing authority is contrary to defendant's position. Thus, the lawyer may not withdraw solely because he or she views the client's case as "weak" or unlikely to prevail; counsel's role on appeal, as at trial, is that of an advocate for and not a judge of the client's case. *Anders v. California*, 386 U.S. 738 (1967); *Swenson v. Bosler*, 386 U.S. 258 (1967).

*Anders*, however, stops short of saying that the lawyer may never

seek to withdraw from an appeal: "Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." 386 U.S. at 744. *Anders* has been read as creating a distinction between appeals "without merit," which counsel must pursue, and those that are "wholly frivolous" and from which an attorney may properly seek leave to withdraw, after compliance with the requirements for investigation and filing of a brief supporting such a view. ABA, *Standards Relating to Criminal Appeals* 77; Hermann, *supra* at 705. It must be said that the operative distinction was left undefined by the Court, and that—while occasional attempts to indicate its content have been essayed, see Hermann, *supra* at 707—later decisions of federal and state courts have not, in general, far improved the situation. Perhaps with this difficulty in view, the ABA *Standards Relating to the Defense Function* appear to go beyond the *Anders* requirement. Pointing out that, under the Supreme Court ruling, counsel on appeal must file a brief even if he or she wishes to withdraw, and suggesting that judicial approval of withdrawal on the grounds of frivolousness would in any event be rare, that volume seems to require that counsel put forth the best argument possible, no matter how weak and unsupported, on the client's behalf rather than seek permission to withdraw. In short, "frivolous" appeals apparently would be treated as appeals "without merit," from counsel's point of view. On the other hand, the Supplement to the *Standards Relating to Criminal Appeals*, § 3.2(b), appears to suggest that counsel may at least seek leave to withdraw rather than file a suggestion to forego oral argument, and purports to bring that provision into line with the *Anders* decision.

This standard follows the language and principle of the ABA *Defense Function* volume, including its disapproval of withdrawal solely based on lack of merit, even when the point of "frivolousness" is reached. The difficulties pointed out there with regard to the *Anders* rule have, in the main, been born out by subsequent experience under that decision. The crucial distinction governing counsel's behavior has remained, after eight years, as obscure as it was when announced. Moreover, it appears that, at least in some jurisdictions, withdrawal pursuant to *Anders* has become very common.\*

\**E.g.*, *People v. Johnston*, 17 Ill. App.3d 648, 308 N.E.2d 160 (1974); *People v. McCarty*, 17 Ill. App. 3d 796, 308 N.E.2d 655 (1974); *People v. Singleton*, 17 Ill. App. 3d 924, 308 N.E.2d 821 (1974); *People v. Townsel*, 14 Ill. App. 3d 105, 302 N.E.2d 213 (1973); *People ex rel. Sheffield v. Twomey*,



Even a partial review of decisions in these jurisdictions reveals that denials of such motions are very rare and that their approval is—as is necessarily the case—ordinarily accompanied by affirmance of the judgment. Thus, it cannot be assumed that requests for release will be infrequent, and even more infrequently granted. It is further significant that similar results are usual where counsel has identified for the court one or more arguable issues when seeking permission to withdraw. *E.g.*, *State v. Dodd*, 20 Ariz. App. 181, 511 P.2d 194 (1973); *State v. Parker*, 20 Ariz. App. 205, 511 P.2d 649 (1973); *State v. Hauersperger*, 20 Ariz. App. 224, 511 P.2d 668 (1973). While a high affirmance rate is generally found in criminal appeals, Administrative Office of the U.S. Courts, *Report of the Director* 90-94 and Table 4 (1972) (13 percent of all criminal cases reversed after hearing or submission), and would be even more likely where counsel asserts the absence of a meritorious issue, legitimate concern over the possibility for formulaic justice is warranted.

The principal source of difficulty is not simply that *Anders* has some potential for abuse; rather, the problem is that the requirements of *Anders* are not susceptible to confident delineation and, are, in a sense, contradictory. It is true that appellate courts have the benefit of a brief by counsel and are themselves obliged to study the record carefully before concluding that the appeal is frivolous. At the same time, the position of appellate counsel—upon whom the court relies as an advocate for the client's position—is fundamentally ambiguous. Counsel must, if he or she wishes to withdraw, persuade the court that any of the indicated "arguable points" are not so arguable as to be nonfrivolous. *See* Hermann, *supra* at 711-12. Indeed, since granting of a motion to dismiss should ordinarily be accompanied by summary disposition of the appeal, the lawyer's *Anders* brief has some of the functional characteristics of a motion to dismiss. Comment, "Frivolous Appeals and the Minimum Standards Project: Solution or Surrender?" 24 *U. Miami L. Rev.* 95, 109-110 (1969). At the very least, it inevitably places the attorney in the position of *amicus curiae* which, the Supreme Court has consistently emphasized, is an inappropriate role for defense counsel to

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14 Ill. App. 3d 264, 302 N.E.2d 439 (1973); *Alston v. State*, 291 So.2d 68 (Fla. App. 1974); *Wright v. State*, 291 So.2d 70 (Fla. App. 1974); *Braxton v. State*, 290 So.2d 512 (Fla. App. 1974); *Hunt v. State*, 290 So.2d 77 (Fla. App. 1974); *State v. Ferguson*, 20 Ariz. App. 161, 511 P.2d 174 (1973); *State v. Canaday*, 20 Ariz. App. 164, 511 P.2d 177 (1973); *State v. Davis*, 20 Ariz. App. 180, 511 P.2d 193 (1973); *State v. McKibben*, 20 Ariz. App. 165, 511 P.2d 178 (1973); *United States v. O'Neill*, 478 F.2d 1209 (5th Cir. 1973); *United States v. Rogers*, 481 F.2d 896 (5th Cir. 1973); *United States v. Tappan*, 488 F.2d 142 (5th Cir. 1973).

assume. *Anders v. California*, 386 U.S. 738, 744. At the worst, it places lawyer and client in frankly adverse positions, carrying an obvious propensity to destroy the trust and confidence upon which their relationship must be founded. And, if the reviewing court declines to appoint new counsel upon refusing leave to withdraw, it is surely too much to hope that the relationship will survive conduct which, to the client, has every appearance of abandonment.

These reservations concerning the *Anders* approach are certainly no less appropriate in juvenile cases. Children are less likely than adults to take advantage of an opportunity to, in effect, plead their case on appeal, not only because of lack of experience and education, but—perhaps most important—because experienced “jailhouse lawyers” are not available in juvenile institutions to give advice concerning the meaning of the briefs they receive, the steps they can take to challenge a lawyer’s conclusions and even the errors of which they might complain. The conflict in counsel’s role is, doubtless, equally acute whether the appeal is from criminal or juvenile court judgments.

The rule stated here will not, of course, entirely relieve the uncertainty of counsel on appeal nor will it guarantee thorough representation in all cases. Some lawyers faced with an apparently hopeless cause will employ some of the adaptive strategies known under *Anders*:

Short of misrepresenting the facts or the law, counsel often responds to the near impossibility of distinguishing between a meritless case, from which one may not withdraw, and a frivolous case, from which one may withdraw, by premitting the issue. Rather than seek to withdraw, he may choose to prosecute the appeal but do so only half-heartedly. Counsel may write a sketchy digest of the testimony and simply state in conclusory fashion that as a matter of law the evidence was insufficient to sustain the verdict. He may argue issues or objections that could have been raised in the trial court but were not, knowing full well that they are much too trivial to be regarded as plain error. He may accurately state the law at present but argue without amplification that the court should reconsider the issue. He may file a brief raising matters obviously lacking in merit and waive oral argument.

Hermann, *supra* at 715–16.

This cost seems, however, no greater than that associated with an invitation to counsel hastily to review the record and then to file a motion and brief reciting that there are no arguable points or posturing the points presented as arguable in such a way as to make them appear frivolous. There is, in reality, no way within existing rules of

law and procedure constitutionally to resolve all difficulties and eliminate all costs involved in criminal and juvenile appeals. The preferable rule, therefore, would seem to be that which will best promote careful consideration of issues on appeal, particularly when the advantage in efficiency produced by other approaches is substantial only when the risk of inadequate review is greatest.

This resolution, it should be emphasized, in no sense detracts from the attorney's professional integrity or affects counsel's duty not to deceive or mislead the court. While a client may, despite counsel's frank advice, effectively demand that an issue be raised on appeal, the client may not demand that it be supported by false authority or that counsel omit damaging but indistinguishable authority. See ABA, Opinion no. 280 (1949); § 10.4, *infra*. The attorney's duty to the respondent requires only that the attorney put forth the best arguments possible, consistent with the rules for conduct of appeals. If—as may happen in some instances—those arguments are necessarily and obviously unpersuasive, the lawyer cannot be faulted for failing to make gold from lead. On the other hand, requiring that the attorney search hard for gold among dross will, so far as possible, afford the accused an opportunity for review without, in view of *Anders*' constitutional requirements, substantial sacrifice in terms of judicial or administrative efficiency and economy. See ABA, *Standards Relating to the Defense Function* 299–302.

#### 10.4 Conduct of the appeal.

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

##### *Commentary*

The fundamental rules governing conduct of appeals do not substantially differ according to the nature of the action giving rise to review. In all cases, counsel is obliged to avoid unnecessary delay in prosecuting the appeal, a duty which runs both to the client and to the court. This is of particular significance where the right to appeal itself may be lost through neglect not found excusable by the court. See generally Note, "Attorney's Negligence: The Belated Appeal," 2 *Valparaiso L. Rev.* 141 (1967); 9 J. Moore, *Federal Practice* § 204.02. Even apart from specific penalties for delay, the lawyer has an affirmative duty to comply with time limits set for each step in the appellate process, except for cause honestly presented to the appellate court. ABA, *Standards Relating to the Defense Function* § 8.4. On the one hand, delay in perfecting and prosecuting the

appeal may cause needless restriction or loss of liberty, which is always of consequence and in some cases may be of considerable significance to the child's development and the parent-child relationship. See commentary to § 6.4(a), *supra*. On the other hand, counsel's obligation to the adversary system and the courts forbid compliance with any demand by a client for intentional delay on appeal. Compare § 1.5, *supra*. See ABA, *Standards Relating to the Defense Function* 303.

The adversary system further requires that counsel on appeal be "scrupulously accurate in referring to the record and the authorities upon which he relies in his presentation to the court in his brief and on his oral argument." *Id.* at § 8.4(b). The lawyer's role as an advocate demands that all reasonable inferences from the facts revealed by the record and all reasonable objections to the record below be argued, but not that counsel misstate or distort the evidence presented, the nature of objections made, or the rulings or procedure of the trial court. The same principle applies to the use of precedent or other authority in the brief and on oral argument. Appellate counsel, as trial counsel, are bound to treat accurately and fairly legal and nonlegal material upon which they or their opponents rely. With specific regard to precedent, the attorney is further obliged to call the court's attention to authority in the jurisdiction "known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." ABA, *Code of Professional Responsibility* DR 7-106(B) (1).

The lawyer is also constrained by the record below in the permissible range of argument. It is, with few exceptions, unprofessional conduct intentionally to refer to or argue on the basis of facts outside the record on appeal. However, counsel may generally present extrinsic information drawn from ordinary human experience, of which the court could take judicial notice. ABA, *Standards Relating to the Defense Function* § 8.4 and Commentary thereto. To this might be added respectable nonlegal authority and information which is accurately cited and material to the issues on appeal. Although, as Mr. Justice Frankfurter observed during argument in *Briggs v. Elliott* (reported with *Brown v. Board of Education*, 347 U.S. 483 (1954)), use of such information amounts to evidence without any testimony, its acceptability has too long been established in many classes of cases to justify serious question at this point. *E.g.*, *Brown v. Board of Education*, 347 U.S. 483, 493-96 and ns. 10 and 11 (1954). The significance of such "evidence" on appeal in cases involving the treatment of children is obvious and great.

**10.5 Postdispositional remedies: protection of the client's right to treatment.**

(a) A lawyer who has represented a client through trial and/or appellate proceedings should be prepared to continue representation when postdispositional action, whether affirmative or defensive, is sought, unless new counsel is appointed at the request of the client or continued representation would, because of geographical considerations or other factors, work unreasonable hardship.

*Commentary*

The general importance of providing counsel for persons subject to juvenile court dispositional orders is affirmed in sections 2.4 and 10.1, *supra*. This standard requires, in addition, that the lawyer who represented the respondent at trial or on appeal ordinarily be prepared to assist the client in postdisposition actions either to challenge the proceedings leading to placement or to challenge the appropriateness of the treatment facility, the course of treatment, or transfer from one facility to another. See *Report on Legal Representation of Indigents in the Family Court Within the City of New York* 36, 37 (1973). This approach is consistent with that taken by the criminal justice standards in viewing the postconviction stages, for many purposes, as functionally an extension of the original proceedings. See ABA, *Standards Relating to Post-Conviction Remedies* §§ 1.2 & 4.4; ABA, *Standards Relating to Providing Defense Services* § 5.2. Indeed, there is special reason for encouraging continued representation in cases involving children. Most postconviction remedies in cases involving adults are initiated by pro se complaints and screened by the court or by some legal services agency specializing in cases of this kind, which has the effect of reducing the burden on trial or appellate counsel. Children, however, are unlikely to be familiar with the availability or use of pro se petitions for collateral attack on the adjudication or for challenge to the course of treatment to which they are subject. Moreover, ombudsmen or institutional legal services are only occasionally found in juvenile institutions. Thus, a juvenile's contact with counsel will in most cases be dependent on previous acquaintance; if trial or appellate counsel does not remain in some respect available to the client, the latter's opportunity for pursuing lawful remedies may effectively be foreclosed.

It is also true that, particularly where the propriety of treatment is involved, close familiarity with the child, his or her parents, and information bearing on the child's condition is often of the greatest

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importance to informed and responsible advocacy of the client's interests at this stage. In this instance, more than at appeal, previous knowledge of the client's circumstances is likely to outweigh the benefit of a "fresh view" of the case. Where time is of the essence, as may be the case in administrative proceedings affecting the course of treatment, substantial advantage attends continued representation by an attorney familiar with the case. Accordingly, the reasons that make substitution of new counsel on appeal desirable when circumstances allow are less compelling here, despite the fact that in some postconviction proceedings adequacy of trial counsel might be put in issue. Compare § 10.3 and commentary, *supra*.

This section does not imply that trial counsel should routinely and continually investigate or monitor the treatment given the client. It does, however, say that counsel should remain open for communication with a client who has been committed to an institution and give all possible help to that client. If geographical separation from the institution or other valid reason makes it practically impossible for the lawyer or agency itself to represent the respondent, the attorney should not refuse further contact but, rather, render any assistance possible to assure that legal advice is provided.

10.5(b)

Counsel representing a client in postdispositional matters should promptly undertake any factual or legal investigation in order to determine whether grounds exist for relief from juvenile court or administrative action. If there is reasonable prospect of a favorable result, the lawyer should advise the client and, if their interests are not adverse, the client's parents of the nature, consequences, probable outcome and advantages or disadvantages associated with such proceedings.

*Commentary*

All facts concerning the appropriateness of the original juvenile court order or of a course or place of treatment should be promptly investigated to determine whether grounds for relief exist. This is so whether counsel continues representation of a client subject to a dispositional order or is retained or appointed at a later stage. Where new counsel is consulted or appointed, it will be necessary that he or she become familiar with the earlier proceedings and treatment administered to the client. An early interview with the client is usually important in ascertaining these underlying facts. After so doing, it is often useful to check

information received from the client and the client's family against any records available, since they may not recall or—particularly if there was no legal representation during earlier stages—understand the decisions or evidence below. See Morosco, "State Post-Conviction Remedies," in 2 R. Cipes, *Criminal Defense Techniques*, ch. 43, § 43.01(3) (1974).

Where the tenor of the postdisposition proceeding is that of "right to treatment," there is perhaps even a stronger demand for thorough investigation and preparation. The point has already been made, in connection with disposition hearings, that reliable and preferably firsthand knowledge on counsel's part is generally necessary to informed advocacy; in some cases it is also a precondition to determining whether and in what form an action can be brought on the client's behalf. Compare § 9.2(a), *supra*, and commentary thereto. Moreover, most state courts maintain their traditional hesitancy to interfere in administration of correctional programs. Often, a heavy burden rests on petitioner to establish the actual level of treatment provided, the needs of the client or clients, the probable effect of treatment provided or lacking, and the remedies available to the court. Whatever the jurisdiction, considerable effort in investigative and discovery activities, as well as locating expert evidence for presentation at trial or by affidavit, is typically required. See, *e.g.*, *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Lollis v. New York State Dep't of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970).

The attorney must, of course, bring his or her professional judgment to bear in ascertaining the existence and grounds for relief in proceedings after disposition. In juvenile as in adult matters, a client's evaluation of the matter is often based on an erroneous view of the law, and the attorney should not confine consideration of the proceedings either to the form or kind of relief originally desired or sought. *Morosco, supra* at ch. 43, § 43.01(3). By the same token, a lawyer is bound here, as elsewhere, to reach an independent professional opinion concerning the availability, merits and potential consequences of legal action for the client's consideration. It is particularly important that the lawyer explain clearly to the client and, in appropriate cases, the client's parents the specific remedy available in a particular postdispositional action. They may expect outright release from custody to be the result of successful litigation, where in most instances successful challenge to a jurisdictional or disposition order—unless, for example, predicated on the unconstitutionality of the statute on which the court's authority was based—will result in a new adjudicative or dispositional hearing, but

not release. Similarly, the usual result in actions concerning suitability of a treatment facility is limited to transfer to an appropriate facility or, where transfer is challenged, continued custody in the original institution. Where the course of treatment is challenged, the client may hope, as the most dramatic remedy, for termination of a specific inappropriate "treatment" measure, such as solitary confinement, e.g., *Lollis v. New York State Dep't of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970), or, very occasionally, provision of some appropriate therapeutic regime. E.g., *In re Harris*, 2 Cr. L. Rep. 2412 (Cook Cty. Cir. Ct., Juv. Div., Dec. 22, 1967); see Gough, "The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox," 16 *St. Louis U. L. Rev.* 182 (1971). The improbability of release or, for that matter, of affirmative relief (such as provision of services) must be clearly explained to the client and the parents so that they may realistically assess the desirability of proceeding with an action. To this must be added information concerning the immediate and long-run costs of challenging administrative action, including—where counsel has good faith reason for that apprehension—the possibility of punitive response by those who may be threatened by legal challenge. This is not to suggest that the lawyer is ethically obliged to paint an unattractive picture or that he or she should not actively encourage a client to seek legal and administrative remedies to which claim can be made. Rather, it implies that counsel should be prudent and careful in advising clients with respect to relief of the kinds here described.

#### 10.5(c)

The lawyer engaged in postdispositional representation should conduct those proceedings according to the principles generally governing representation in juvenile court matters.

#### *Commentary*

Postconviction proceedings, as that term is used in this part, may be of several kinds. Some are, in essence, original judicial proceedings, relitigating matters related to the conduct of the original adjudication. In these, the problems and principles of investigation, preparation and trial in adjudicative proceedings are of obvious applicability. Other forms of action look to factors of the kind presented by dispositional decisions. Proceedings involving right to treatment, for example, typically call into question the child's physical, psychological and social condition and the treatment facilities actually available through the authority to whom custody is



given. The techniques of investigation and preparation appropriate at the initial disposition are applicable at the postdisposition stage as well, although the method of presentation differs substantially from disposition hearings in its procedural and evidentiary characteristics. Compare ABA, *Standards Relating to the Defense Function* § 8.5.

**10.6 Probation revocation; parole revocation.**

**(a) Trial counsel should be prepared to continue representation if revocation of the client's probation or parole is sought, unless new counsel is appointed or continued representation would, because of geographical or other factors, work unreasonable hardship.**

*Commentary*

The same factors that make continued representation by trial counsel desirable in proceedings related to postdispositional remedies and protection of the right to treatment operate with respect to probation or parole revocation proceedings. See commentary to § 10.5(a), *supra*. The Supreme Court assumed that "counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceeding," *Mempa v. Rhay*, 389 U.S. 128, 137 (1967), and the same may be said of the functionally similar probation revocation hearings. Geographical and other difficulties in continued representation are, perhaps, more likely to arise where the client has been committed and paroled, and dissociation from the matter is more often justified. In any event, the lawyer should give all possible assistance in securing legal assistance when he or she cannot personally provide representation.

**10.6(b)**

**Where proceedings to revoke conditional liberty are conducted in substantially the same manner as original petitions alleging delinquency or need for supervision, the standards governing representation in juvenile court generally apply. Where special procedures are used in such matters, counsel should advise the client concerning those procedures and be prepared to participate in the revocation proceedings at the earliest stage.**

*Commentary*

A variety of procedures for revocation of probation or parole for juveniles are found among the states. In some, either by statute or practice, review of alleged probation violations are treated in sub-

stantially the same manner as original delinquency or PINS petitions. Where this is true, the matter is both procedurally and substantially akin to the hearings discussed throughout these standards. The issues to be determined, as in delinquency or PINS matters, are whether a jurisdictional predicate for intervention can be established—here, whether a lawful condition of release has in fact been violated—and, if so, what form of disposition is called for under all the circumstances. The principles governing investigation, preparation, advice and conduct with regard to the pretrial and adjudicative stages are of obvious applicability here. Factual investigation regarding the client's contravention of law or other condition of probation is in most cases similar to investigation of the facts which led to the original adjudication. The attorney should also consider whether the condition allegedly violated is one that was or could have been lawfully imposed.\*

While violation of a term or condition of probation is usually viewed as a necessary and sufficient precondition to revocation of liberty, ABA, *Standards Relating to Probation* § 5.1(a), institutionalization does not automatically follow from that finding. As the criminal justice standards observe concerning adult probation, "the fact of a violation, duly established . . . poses the need for a correctional judgment not unlike the initial sentencing." ABA, *Standards Relating to Probation* 58. Counsel should, accordingly, prepare for and conduct this aspect of a revocation proceeding in a manner substantially similar to an original disposition hearing.

Where the local procedure for revoking probation and parole

\*While juvenile court judges are traditionally given broad discretion in shaping probationary terms, see Comment, *Juvenile Probation: Restrictions, Rights and Rehabilitation*, 16 *St. Louis U. L. J.* 276, 277-78 (1971), a variety of conditions have been found illegal. There is often a requirement of adequate definition in the terms and of notice to the probationer, so that revocation may not be predicated on overvague or uncommunicated rules. *E.g.*, *Lathrop v. Lathrop*, 50 N.J. Super. 525, 142 A.2d 920 (1958); *George v. State*, 99 Ga. App. 892, 109 S.E.2d 883 (1959). See Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 *Texas L. Rev.* 1 (1968); Comment, *supra* at 287-88. *Contra: In re Green*, 203 So.2d 470 (Miss. 1967), *cert. denied* 392 U.S. 945 (1968) (condition that respondent "stay out of trouble" upheld on the ground that "[c]onditions of probation are frequently broadly phrased, since the many types of appropriate causes for revocation cannot be predicted"). Under given circumstances, conditions looking to payment of fines or restitution, *People v. Becker*, 349 Mich. 476, 84 N.W.2d 833 (1957); exile or banishment, *People v. James R. O.*, 36 A.D.2d 828, 321 N.Y.S.2d 518 (1971); and religious observance, *Jones v. Commonwealth*, 185 Va. 335, 38 S.E.2d 444 (1946), among others, have been held beyond the court's statutory or constitutional power or abusive of discretion.

differs from that used in original juvenile court proceedings, the lawyer must promptly become familiar with the nature of the procedure employed and advise the client of the nature and consequences of the forthcoming hearing. In preparing and presenting the client's case, the standards governing representation in juvenile court matters should govern to the extent practicable under local rules.

#### 10.7 Challenges to the effectiveness of counsel.

(a) A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel's actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued.

#### *Commentary*

Newly assigned or retained counsel, like his or her predecessor, has a duty to represent the client zealously and to present on the client's behalf every lawful claim or defense available under the circumstances. If full review of prior counsel's conduct indicates that a good faith claim of ineffective representation can be asserted, successor counsel is required to advise the client of the fact and, if so instructed, to pursue vigorously a claim on that ground. ABA, *Code of Professional Responsibility* EC 7-1; ABA, *Standards Relating to the Defense Function* § 8.6. This responsibility runs not only to the client but, in a sense, to the integrity of the legal profession itself. Cf. ABA, *Code of Professional Responsibility* DR 1-103; ABA, *Canons of Professional Ethics*, Canon 29. In evaluating the conduct of previous counsel, of course, the lawyer must take into account all factors that his or her predecessor might legitimately have considered. Successor counsel should not, however, fail to pursue a claim of ineffective assistance solely because an earlier attorney followed common practice in the jurisdiction or before a particular judge. Cooptation of attorneys in some juvenile courts has been too well established for serious question, see, e.g., commentary to § 3.1(a), *supra*, and any consequent failure of zealous and full representation cannot be justified by reference to prevailing custom.

On the other hand, when the lawyer's investigation indicates that the client has received adequate assistance, he or she should so advise the client and, in certain cases, may decline to press a claim on

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that basis in future proceedings. See §§ 10.4 and 10.5, *supra*; ABA, *Standards Relating to the Defense Function* § 8.6(b).

**10.7(b)**

A lawyer whose conduct of a juvenile court case is drawn into question may testify in judicial, administrative or investigatory proceedings concerning the matters charged, even though in so doing the lawyer must reveal information which was given by the client in confidence.

*Commentary*

Under the ABA *Code of Professional Responsibility*, lawyers may reveal confidences or secrets to the extent necessary to defend themselves, their associates or employees against accusations of wrongful conduct. DR 4-101(C). Thus, it has been held that a lawyer is entitled to testify concerning confidential material when his or her professional conduct has been called into question. *Everett v. Everett*, 319 Mich. 475, 29 N.W.2d 919 (1947); ABA, *Standards Relating to the Defense Function* § 8.6(c); see also, *United States ex rel. Phelan v. Brierly*, 312 F. Supp. 350 (E.D. Pa. 1970), *aff'd*. 453 F.2d 73, *cert. denied* 411 U.S. 966. The scope of the client's implied waiver of confidentiality in these instances is limited, of course, to those statements which are material to the alleged misconduct of the attorney. ABA, Opinion 19 (1930).

*Appendix A*  
*American Bar Association Project on Standards*  
*for Criminal Justice*  
*Standards Relating to the Defense Function*

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PART VII. TRIAL

7.2 Selection of jurors.

(a) The lawyer should prepare himself prior to trial to discharge effectively his function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected, and the exercise of both challenges for cause and preemptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of jurors the lawyer should restrict himself to investigatory methods which will not harass or unnecessarily embarrass potential jurors or invade their privacy and, whenever possible, he should restrict his investigation to records and sources of information already in existence.

(c) In jurisdictions where counsel is permitted personally to question jurors on voir dire, the opportunity to question jurors should be used solely to obtain information for the intelligent exercise of challenges. A lawyer should not purposely use the voir dire to present factual matter which he knows will not be admissible at trial or to argue his case to the jury.

7.3 Relations with jury.

(a) It is unprofessional conduct for the lawyer to communicate privately with persons summoned for jury duty or impaneled as jurors concerning the case prior to or during the trial. The lawyer should avoid the reality or appearance of any such improper communications.

(b) The lawyer should treat jurors with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.

(c) After verdict, the lawyer should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgment in future jury service. If the lawyer has reasonable ground to believe that the verdict may be subject to legal challenge, he may properly, if no statute or rule prohibits such course, communicate with jurors for that limited purpose, upon notice to opposing counsel and the court.

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