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Institute of Judicial Administration

American Bar Association

**Juvenile Justice Standards**

*STANDARDS RELATING TO*

*Pretrial Court Proceedings*

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

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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*

*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:

COURT ORGANIZATION AND ADMINISTRATION  
COUNSEL FOR PRIVATE PARTIES  
PROSECUTION  
THE JUVENILE PROBATION FUNCTION: INTAKE AND PRE-  
DISPOSITION INVESTIGATIVE SERVICES  
ADJUDICATION  
APPEALS AND COLLATERAL REVIEW  
TRANSFER BETWEEN COURTS

*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 2.1 B. was amended by adding a provision that the judge's personal explanation of the written notice of the juvenile's rights should be in open court at the prescribed hearing.

2. Standard 2.2 B. was amended by adding to the rights to be explained by the judge the right to a trial by jury.

3. Standard 3.10 was amended to restrict the medical and scientific reports to be disclosed to the petitioner to those intended to be introduced in evidence.

Commentary was revised accordingly.

4. Standard 5.1 C. was amended to permit juvenile's counsel to waive the right to bar statements or other information derived from statements made by the juvenile to an intake officer or social service worker without the advice of counsel.

Commentary was revised to correct the statement that the standard is drawn practically verbatim from the U.S. Children's Bureau Model Family Court Act § 26, since it no longer applies to the revised standard.

5. Standard 6.8 A. was amended to add a limitation on the parent's right to free counsel by a cross-reference to Standard 6.5.



Commentary was revised by deleting a comment that the standard would free the parent's right to counsel from dependence on the exercise of judicial discretion.

6. Standard 6.9 A. was amended by changing the appointment of counsel for indigent parents from a mandatory to a discretionary obligation of the court.

Commentary was revised by adding a discussion of the position that parents' right to counsel is discretionary at the adjudicatory proceeding and mandatory at all other proceedings. It also notes that an adult's right to counsel is waivable in delinquency proceedings, whereas the juvenile's right to counsel is nonwaivable.

7. Commentary to Standard 1.3 was revised by adding a clarifying statement that particularity in setting forth the allegations in the petition should not preclude the customary requirement that the pleadings be brief and succinct.

8. Commentary to Standard 1.7 was revised to add a provision that parents who waive service by knowingly submitting to the proceeding without objection should be provided with a copy of the petition at the proceeding.

9. Commentary to Standard 3.3 A. was revised to add a reference to the greater safeguards required for pretrial investigation of juvenile offenders, as compared to adult criminals, with cross-references to such provisions in the *Police, Records and Information*, and *Interim Status* volumes.

The commentary also was revised to add a comment that the results of a lineup or similar identification procedures should be subject to discovery by respondent's counsel, as in criminal proceedings.

10. Commentary to Standard 4.1 was revised by adding a comparison of provisions covering probable cause hearings in the *Prosecution*, *Interim Status*, and *Transfer Between Courts* volumes.

11. Commentary to Standard 6.6 C. was revised by adding a statement that a corrections agency having custody of a juvenile is not intended to come within the definition of "parent" for the purposes of this standard.

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## *Pretrial Court Proceedings*

## *Introduction*

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The problems of pretrial court procedure in delinquency cases are not entirely unique. Delinquency and criminal proceedings have much in common. The purpose of both is to determine whether a person "as a result of alleged misconduct" should be adjudicated, "with the consequence that he may be committed to a state institution." *In re Gault*, 387 U.S. 1 (1967), at 13. In both proceedings, also, the resulting label ("delinquent," "criminal") stigmatizes the adjudicated person.

For the most part, these standards adopt the implicit premise of the Supreme Court's decisions in *Gault*, *In re Winship*, 397 U.S. 358 (1970), *McKeiver v. Pennsylvania*, 402 U.S. 528 (1971), and *Breed v. Jones*, 421 U.S. 519 (1975), that unless the special protective and rehabilitative aims of the juvenile justice system require otherwise, criminal procedure safeguards should apply.

Of course, some criminal procedural devices, like the grand jury, are neither necessary nor well suited to the pursuit of fairness in delinquency proceedings, and have not been adopted here. In other areas, criminal procedures will not suffice to implement the legal system's special responsibility and concern for young persons. Hence the standards often resort to civil procedure models, such as discovery depositions (Standards 3.3 B., 3.12), and guardians *ad litem* (Standard 6.7). Further, the special problems posed by the juvenile's immaturity, and by the parent's involvement in the proceedings, sometimes require solutions for which there are no ready precedents in criminal or civil procedures.

This volume of standards deals with pretrial court procedures in delinquency cases. Intake screening, consent decrees, transfer to criminal court, and detention hearings are treated in other volumes.

The most far-reaching departure from existing law in these standards is to make the juvenile's representation by counsel mandatory (Part V). As the President's Task Force on Juvenile Delinquency said in 1967:

There is no single action that holds more potential for achieving pro-

cedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. President's Commission on Law Enforcement and Administration of Justice, "Task Force Report: Juvenile Delinquency and Youth Crime" 32 (1967).

Even a well-trained and conscientious defense attorney, it is true, cannot guarantee a client fair treatment in a court unprepared to comply with the spirit of *Gault* and later Supreme Court decisions, see Stapleton and Teitelbaum, *In Defense of Youth* ch. 5 (1972). But permitting adolescents without legal advice to make "voluntary and intelligent" waivers of their basic constitutional rights is inconsistent with the law's protective stance toward minors in other contexts, and difficult to reconcile with principles of fairness.

The presence and assistance of a juvenile's parent cannot be accepted as a substitute for competent legal counsel. Both should be available to a young person charged with delinquency. Part V of the standards therefore provides the right to counsel at all stages of the proceeding, and makes inadmissible the juvenile's uncounseled statements made while in police custody or at intake (Standard 5.1).

The policy of mandatory legal representation for the juvenile leads to a related recommendation for change in the law: elimination of financial eligibility standards for court-appointed counsel. Defense counsel services should be provided at state expense to all respondents who do not choose to be represented by retained counsel. Whether the delinquency petition is proven or dismissed, there is no more reason to tax the respondent or the respondent's family for these mandatory services than for the services of the judge, prosecutor, or court clerk.

The presence of defense counsel somewhat simplifies, but does not resolve, the difficult issues regarding waiver of other rights of the juvenile. Part VI contains standards governing the respective roles of the juvenile, counsel, parents, and the court in matters of waiver. For the most part, the standards leave waiver decisions to the youth, advised by counsel and parents (Standard 6.2). For youths too immature to "adequately comprehend and participate in the proceeding" a guardian *ad litem*, who may be the parent, is appointed to instruct counsel in the litigation on behalf of the youth (Standard 6.1 C.). However, no one may waive an immature respondent's right to be tried by entering a plea on his or her behalf admitting the allegations of delinquency (Standard 6.3).

A major uncertainty in existing law concerns the proper role of parents in delinquency proceedings. Standards are needed to regulate the parent's participation in two respects: as an aid, counsel, and

support for the youth; and as one whose own (custodial) rights are at stake in the proceedings. Several standards in Part VI and elsewhere recognize the important role parents play in helping to protect rights of the youth, such as consultation with the youth before waiver of any substantial right (Standard 6.2). Part VI also defines the parent's rights in delinquency proceedings to protect their own interests, which may conflict with the interests of the respondent. These rights include the right for counsel to appear for limited purposes and the right to have court-appointed counsel if the parent is financially eligible therefor and does not waive the right. The court may limit the parent's participation if necessary to protect the youth's interests (Standard 6.5 B.).

Excessive informality has often characterized the drafting and service of pleadings in delinquency proceedings and the issuance of process. These practices may result in denying the respondent and the parent timely, adequate notice of the nature of the proceedings, and of their legal rights so as to violate their constitutional rights to due process of law. *In re Gault*, 387 U.S. 1 (1967), at 31-34. The respondent's right to double jeopardy protection, which the Supreme Court recently extended to delinquency proceedings in *Breed v. Jones*, 421 U.S. 519 (1975), is also threatened by insufficiently detailed and imprecise pleadings. Drawing heavily on precedents from criminal procedure, Part I of the standards addresses these matters in some detail.

Also addressed in Standard 1.3 and, more generally, Standard 2.3, are problems of communicating with families whose predominant language is not English. The courts in some multilingual communities have not always been fully sensitive to the need for special initiatives to ensure that linguistic handicaps do not result in severe injustices to youths and their parents. The hazards of ineffective verbal and written communication are particularly important when fundamental legal rights are expressly waived (Standard 6.4 B.).

Even timely service of a fully detailed petition will not give the parties sufficient notice to enable them to prepare for delinquency trials that are necessary and avoid trials that are unnecessary. Broad pretrial discovery is used for that purpose in civil proceedings, and to a lesser extent, in criminal proceedings. See ABA, *Standards for Criminal Justice, Discovery and Procedure Before Trial* 34-46 (Approved Draft, 1970). Based on the essential similarity of pretrial discovery needs in criminal and juvenile delinquency proceedings, Part III recommends application of liberal, bilateral discovery along the lines recommended by the American Bar Association for criminal cases. Aside from minor adaptation of the ABA *Standards for Criminal Justice* to meet the special discovery needs in delinquency cases, the major innovation contained in Part III is to make discovery depo-



sitions available to both the petitioner and respondent without prior court approval (Standards 3.3, 3.12). With appropriate cautions against indiscriminate use, the standards also recommend the use of omnibus hearings and pretrial conferences in the calendaring of delinquency proceedings (Part VII).

The respondent's right to a probable cause hearing is the subject of Part IV. The Supreme Court has recently recognized a Fourth Amendment right for detained criminal defendants to a judicial determination of probable cause prior to trial. *Gerstein v. Pugh* 420 U.S. 103 (1975). Because the pendency of a delinquency petition is detrimental to the juvenile, it is especially important to allow the defense in cases which are not tried promptly to test the evidentiary sufficiency of the petition in court. The standard here goes beyond *Gerstein* in giving juveniles, detained and nondetained, the right to an adversary probable cause hearing in such cases, and prohibits judicial reliance on hearsay evidence to support the finding (see Standard 4.2).

The Supreme Court's 1967 ruling in *Gault* firmly applied the fundamental requirements of due process to trials in juvenile delinquency proceedings. But the case expressly left undecided the constitutional requirements applicable to proceedings before trial. Since then, the bench and bar have diligently sought to apply *Gault's* vague command to treat juveniles in delinquency cases with "fundamental fairness." In this task many jurisdictions have been hampered by the lack of detailed guidance from court rules. Implicit in these standards is the recognition that in each jurisdiction it should be clear what rules govern the pretrial stages of delinquency proceedings. For some purposes a state's existing civil or criminal procedure rules can be stated to apply; for others, unique rules may be needed. Whatever their content, the existence of comprehensive juvenile court rules is essential to promote efficiency, certainty and uniformity in the handling of delinquency cases. We hope that these standards will contribute in some measure to the achievement of those goals.

The Reporter wishes to thank the members of the Drafting Committee for their fine contributions to this volume. Under the sensitive and vigorous leadership of Chairman Dean Charles Z. Smith, the Committee performed its task in a spirit of dedicated service and cooperation, which made it a privilege to work with them. The Reporter wishes also to thank the project staff for their generous and efficient cooperation, and to acknowledge the contributions of research assistants Deborah E. Lans and Linda Kaye Lager. They, and Ms. Lans especially, deserve a major share of credit for whatever merits this work may have.

## *Standards*

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### PART I: REPORT, PETITION, AND SUMMONS

#### 1.1 Reports.

No delinquency petition should be filed unless a report in the matter has first been filed with the intake department and the prescribed procedures for intake and prosecution screening have been complied with. A delinquency report is a sworn written statement of the essential facts constituting the grounds of a juvenile's alleged delinquency. Where feasible, it should be signed by a person who has personal knowledge of the facts; otherwise it may be made by a person who is informed of the facts and believes that they are true.

#### 1.2 Functions of petition and summons.

##### A. The petition should serve the following purposes:

1. assist the parties to prepare adequately for trial and reduce surprise or disadvantage to the respondent;
2. provide a record of the allegations tried for purposes of the double jeopardy protection; and
3. enable the court to conduct an orderly and directed fact-finding hearing.

##### B. The summons should serve the following purposes:

1. ensure the presence of all essential participants at the initial hearing and at all later stages of the proceedings; and
2. advise the parties of the contents of the petition.

C. A statement advising the parties and other participants of their legal rights should be included in or appended to either the petition or the summons.

#### 1.3 Contents of the petition.

A. The petition should set forth with particularity all factual and other allegations relied upon in asserting that the juvenile is within the juvenile court's jurisdiction, including:

1. the name, address, and date of birth of the juvenile;
2. the name and address of the juvenile's parents or guardian and, if the juvenile is in the custody of some other person, such custodian;
3. the date, time, manner, and place of the acts alleged as the basis of the court's jurisdiction;
4. a citation to the section and subdivision of the juvenile court act relied upon for jurisdiction; and
5. a citation to the federal, state, or local law or ordinance, if any, allegedly violated by the juvenile.

B. The petition should state the kinds of dispositions to which the respondent could be subjected if the allegations of the petition were proven, such as transfer for criminal prosecution,\* probation, or removal from the home.

#### 1.4 Filing and signing of the petition.

Petitions alleging delinquency should be prepared and filed by the prosecuting attorney and should bear the prosecuting attorney's signature to certify that he or she has read the petition and that to the best of his or her knowledge, information, and belief there is good ground to support it.

#### 1.5 The summons; subpoenas.

A. Upon the filing of a petition the clerk should issue a summons.

B. The summons should direct the parties to appear before the court at a specified time and place for an initial appearance on the petition. A copy of the petition should be attached to the summons.

C. A copy of the summons should be served by mail or in person.

D. The summons should be served upon the following persons:

1. the juvenile;
2. the juvenile's parents and/or guardian, and, if the juvenile is in custody of some other person whose knowledge or participation in the proceedings would be appropriate, such custodian;
3. the attorney[s] for the juvenile and parents, if the identity of the attorney[s] is known; and
4. any other persons who appear to the court to be necessary or proper parties to the proceedings.

E. No bench warrant should issue against a respondent unless it appears to the judge from the delinquency report, or from an affidavit or affidavits filed with the report, that there is probable cause to believe that the court has jurisdiction over the respondent, and:

1. the respondent fails to appear in response to a summons; or

\*These standards were drafted before the Supreme Court's decision in *Breed v. Jones*, 421 U.S. 519 (1975).

2. the prosecuting attorney demonstrates to the court that issuance or service of a summons will result in the respondent's flight; or

3. a summons having issued, it is shown that reasonable efforts to serve the respondent, both personally and by mail, have failed.

F. [Upon application of a party, the clerk of the court should issue, and the court on its own motion should have the power to issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents, and other tangible objects at any hearing.] Without prejudice to the court's power to quash any subpoena for cause shown, the respondent's ability to subpoena public officials and records of the respondent's involvement with law enforcement, judicial, welfare, school, or other public agencies, including any reports or records, whether or not made in connection with the particular case, should not be impaired.

#### 1.6 Multilingual notices.

Courts serving populations containing significant numbers of persons whose dominant language is not English should attempt to send petitions, summonses, and notifications of rights in English and in the dominant language of such persons. Such courts should take appropriate precautions to ensure that non-English-speaking recipients of court notices receive actual notice of the nature of the document sent.

#### 1.7 Waiver of service of summons and petition.

A. The respondent in a delinquency proceeding should be permitted to waive service of the summons and petition as provided in Standards 6.1 through 6.4. If a respondent accompanied by counsel appears and knowingly submits to the proceedings without objecting to improper or defective service, such conduct should constitute waiver of those objections.

B. Parents of respondents and other adults should be permitted to waive their rights to service of the summons and petition as provided in Standard 6.10. A parent's voluntary and knowing appearance and submission to the court should constitute waiver of such rights.

## PART II: NOTIFICATION OF RIGHTS; INITIAL APPEARANCE

### 2.1 Notification of rights.

At every stage in the proceedings at which these standards require

the giving of notice of rights, the following requirements should be satisfied:

A. notification of the juvenile's rights should always be given to both the juvenile and the parent and/or guardian or custodian who is present at the proceedings;

B. the notice should be in writing but should be explained to the recipient by the judge personally in open court at the regularly scheduled hearing, in all circumstances where notice is given in the recipient's presence;

C. notification should be given in simple language calculated to ensure the recipient's understanding;

D. in bilingual and multilingual communities, notification should be given in English and in the dominant language of the recipient; and

E. the official record of the proceedings should record the fact that such notice was given and the contents of the notice.

## 2.2 Initial appearance.

A. The initial appearance of a delinquency respondent before a judge of the juvenile court should be not later than [five] days after the petition has been filed.

B. At the first appearance in court the juvenile should be notified by the judge of the contents of the petition, and of his or her rights, including:

1. the right to counsel as provided in Standard 5.2;
2. the right to have parents present at all stages of the proceedings;
3. the right to a probable cause hearing;
4. the right to a trial by jury;
5. the right to confrontation and cross-examination of witnesses; and
6. the privilege against self-incrimination.

C. At the initial appearance, counsel should be appointed if necessary, and a date should be set for the fact-finding hearing.

## 2.3 Multilingual communications.

In bilingual and multilingual communities, the court and counsel should take appropriate steps to ensure that language barriers do not deprive the respondent, parents, and other appropriate persons of the ability to understand and effectively participate in all stages of the proceedings. Such steps should include the provision of interpreters at all stages of the proceedings, at public expense.

## PART III: DISCOVERY

### Introductory

#### 3.1 Scope of discovery.

In order to provide adequate information for informed intake screening, diversion, and pleas in delinquency cases, and to expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial and other judicial hearings should be as full and free as possible consistent with protection of persons and effectuation of the goals of the juvenile justice system.

#### 3.2 Responsibilities of the trial court and of counsel.

A. The trial court should encourage effective and timely discovery, conducted voluntarily and informally between counsel, and should supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly, expeditiously, and with a minimum of imposition on the time and energies of the persons concerned.

B. Counsel for the petitioner and respondent should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of imposition on the time and energies of the persons concerned.

### Disclosure to the Respondent

#### 3.3 Petitioner's obligations.

A. Except as otherwise provided as to matters not subject to disclosure (Standard 3.8) and protective orders (Standard 3.17), the petitioner should disclose to respondent's counsel the following material and information within his or her possession or control:

1. the names and addresses of persons whom the petitioner intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;
2. any written or recorded statements and the substance of any oral statements made by the respondent, or made by a co-respondent if the trial is to be a joint one;
3. any reports or statements of experts, made in connection with the particular case, including scientific tests, experiments or comparisons, and results of physical or mental examinations, be-

havioral observations, and investigations of the respondent's school, social, or family background;

4. any reports or records, whether or not made in connection with the particular case, of the respondent's involvement with law enforcement, judicial, welfare, school or other public agencies, which might assist counsel in representing the respondent before the court at any stage of the proceedings;

5. any books, papers, records, documents, photographs, or tangible objects which the petitioner intends to use in the hearing or trial or which were obtained from or belong to the respondent;

6. any record of prior criminal convictions of persons whom the petitioner intends to call as witnesses at the hearing or trial; and

7. those portions of grand jury minutes containing testimony of the respondent and relevant testimony of persons whom the petitioner intends to call as witnesses at the hearing or trial.

B. Subject to Standards 3.8 and 3.17, the respondent should have the right to obtain discovery by way of deposition.

C. The petitioner should inform respondent's counsel:

1. whether there is any relevant recorded grand jury testimony which has not been transcribed; and

2. whether there has been any electronic surveillance (including wiretapping) of conversations to which the respondent was a party or of the respondent's premises.

D. Subject to Standard 3.17, the petitioner should disclose to respondent's counsel any material or information within his or her possession or control which tends to negate the allegations of the petition or would tend to mitigate the seriousness thereof.

E. The petitioner's obligations under this standard extend to material and information in the possession or control of members of the petitioner's staff and of any others who have participated in the screening, investigation, or evaluation of the case and who either regularly report, or who have reported with reference to the particular case, to the petitioner's office.

### 3.4 Petitioner's performance of obligations.

A. The petitioner should perform the obligations set forth in Standard 3.3 as soon as practicable following the filing of a petition in respect of the respondent.

B. The petitioner may perform these obligations in any manner mutually agreeable to petitioner and counsel for the respondent, or by:

1. notifying counsel for the respondent that material and information described in general terms may be inspected, obtained,

tested, copied, or photographed during specified, reasonable times; and

2. making available to respondent's counsel, at the time specified, such material and information, and providing suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

C. The petitioner should ensure that a flow of information is maintained between the various investigative personnel and petitioner's office sufficient to place within his or her possession or control all material and information relevant to the respondent and the allegations of the petition.

### 3.5 Additional disclosures upon request and specification.

Subject to Standards 3.8 and 3.17, the petitioner should, upon request of the respondent, disclose and permit inspection, testing, copying, and photographing of any relevant material and information regarding:

A. specified searches and seizures;

B. the acquisition of specified statements from the respondent; and

C. the relationship, if any, of specified persons to the petitioning authority.

### 3.6 Material held by other governmental personnel.

Upon the request of respondent's counsel and designation of material or information that would be discoverable if in the possession or control of the petitioner, and that is in the possession or control of other governmental personnel, the petitioner should use diligent good faith efforts to cause such material to be made available to respondent's counsel; if the petitioner's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to respondent's counsel.

### 3.7 Discretionary disclosures.

A. Upon a showing of materiality to the preparation of the respondent's case and if the request is reasonable, the court, in its discretion, may require disclosure to respondent's counsel of relevant material and information not covered by Standards 3.3, 3.5, and 3.6.

B. The court may deny disclosure authorized by this standard if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance



or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to respondent's counsel.

**3.8 Matters not subject to disclosure.**

A. Disclosure should not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the petitioner's attorney or members of petitioner's legal staff.

B. Disclosure of an informant's identity should not be required where the identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the respondent. Disclosure should not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

**3.9 Discovery at intake screening stage.**

Upon the request of counsel for a juvenile who has been referred for intake screening on a delinquency report, the intake unit should give the juvenile's counsel access to all documents, reports, and records within its possession or control which concern the juvenile or the alleged offense.

**Disclosure to the Petitioner**

**3.10 Medical and scientific reports.**

Subject to constitutional limitations, the trial court may require that the petitioner be informed of and permitted to inspect and copy or photograph any reports or statements of experts made in connection with and intended to be introduced in evidence in the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

**3.11 Nature of defense.**

Subject to constitutional limitations, the trial court may require that the petitioner be informed of the nature of any defense which respondent's counsel intends to use at trial and the names and addresses of persons whom respondent's counsel intends to call as witnesses in support thereof.

**3.12 Depositions.**

Subject to Standards 3.8 and 3.17, the petitioner should have the right to obtain discovery by way of deposition, except that the petitioner should not have the right to depose the respondent without the respondent's consent.

### Regulation of Discovery

#### 3.13 Investigations not to be impeded.

Subject to Standards 3.8 and 3.17, neither the counsel for the parties nor others officially involved in the case should advise persons having relevant material or information (except the respondent) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

#### 3.14 Deposition procedures.

Depositions in delinquency proceedings should be governed by the rules governing depositions in criminal proceedings in jurisdictions which have such rules. In other jurisdictions, special rules to govern depositions in delinquency proceedings should be adopted.

#### 3.15 Continuing duty to disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, such party should promptly notify the other party or opposing counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court should also be notified.

#### 3.16 Custody of materials.

Any materials furnished to an attorney pursuant to these standards should remain in the exclusive custody of such attorney and be used only for the purposes of conducting the case, and should be subject to such other terms and conditions as the court may provide. In the discretion of counsel for the respondent, the contents of furnished material may be disclosed to the respondent and, subject to a mature juvenile's consent under Standard 6.5 A. 2. to the respondent's parent or guardian *ad litem*. Counsel should exercise utmost caution before doing so if disclosure might cause injury or embarrassment to the respondent or any other person and if disclosure is not necessary to protect the respondent's interests in the proceedings.

#### 3.17 Protective orders.

Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled under these standards must be disclosed in time to permit counsel to make beneficial use thereof.

### 3.18 Excision.

When some parts of certain material are discoverable under these standards, and other parts not discoverable, as much of the material should be disclosed as is consistent with the standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole. Material excised pursuant to judicial order should be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

### 3.19 *In camera* proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera*. A record should be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing should be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. A judicial officer who is exposed in an *ex parte* proceeding under this standard to material which might be prejudicial to the absent party should be excused from further involvement in the case.

### 3.20 Sanctions.

A. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

B. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

## PART IV: THE RIGHT TO A PROBABLE CAUSE HEARING

### 4.1 The right to a probable cause hearing.

A. In all delinquency proceedings the respondent should have the right to a judicial determination of probable cause, unless the adjudicatory hearing is held within [five] days after the filing of the petition if the juvenile is detained, and within [fifteen] days if the juvenile is not detained. Unless it appears from the evidence that there is probable cause to believe that an offense has been committed

and that the respondent committed it, the petition should be dismissed.

B. Unless there has been a prior judicial determination of probable cause, detention and transfer hearings should commence with consideration of that issue.

#### 4.2 The conduct of a probable cause hearing.

A. The probable cause hearing should be held before a judge of the juvenile court. The judge should inform the juvenile of his or her rights as provided by Standard 2.2 B.

B. The prosecutor should be required to present evidence of probable cause as to every element of the offense and as to the respondent's identity as the perpetrator. The finding of probable cause should not be based upon hearsay in whole or in part. The respondent should have the opportunity to cross-examine witnesses and to introduce evidence and witnesses on his or her own behalf.

### PART V: RESPONDENT'S RIGHT TO COUNSEL

#### 5.1 Scope of the juvenile's right to counsel.

A. In delinquency cases, the juvenile should have the effective assistance of counsel at all stages of the proceeding.

B. The right to counsel should attach as soon as the juvenile is taken into custody by an agent of the state, when a petition is filed against the juvenile, or when the juvenile appears personally at an intake conference, whichever occurs first. The police and other detention authorities should have the duty to ascertain whether a juvenile in custody has counsel and, if not, to facilitate the retention or provision of counsel without delay.

C. Unless waived by counsel, the statements of a juvenile or other information or evidence derived directly or indirectly from such statements made to the intake officer or social service worker during the process of the case, including statements made during intake, a predisposition study, or consent decree, should not be admissible in evidence prior to a determination of the petition's allegations in a delinquency case, or prior to conviction in a criminal proceeding.

#### 5.2 Notification of the juvenile's right to counsel.

As soon as a juvenile's right to counsel attaches under Standard 5.1 B. the authorities should advise the juvenile that representation

by counsel is mandatory, that there is a right to employ private counsel, and that if private counsel is not retained counsel will be provided without cost.

### 5.3 Juvenile's eligibility for court-appointed counsel; parent-juvenile conflicts.

A. In any delinquency proceeding, if counsel has not been retained for the juvenile, and if it does not appear that counsel will be retained, the court should appoint counsel. No reimbursement should be sought from the parent or the juvenile for the cost of court-appointed counsel for the juvenile, regardless of the parent's or juvenile's financial resources.

B. At the earliest feasible stage of a delinquency proceeding the intake department should determine whether a conflict of interest exists between the juvenile and the parent, and should notify the court and the parties of any finding that a conflict exists.

C. If a parent has retained counsel for a juvenile and it appears to the court that the parent's interest in the case conflicts with the juvenile's interest, the court should caution both the parent and counsel as to counsel's duty of loyalty to the juvenile's interests. If the parent's dominant language is not English, the court's caution should be communicated in a language understood by the parent.

## PART VI: WAIVER OF THE JUVENILE'S RIGHTS; THE ROLE OF PARENTS AND GUARDIANS *AD LITEM* IN THE DELINQUENCY PROCEEDINGS

### Waiver of the Juvenile's Rights

#### 6.1 Waiver of the juvenile's rights: in general.

A. Any right accorded to the respondent in a delinquency case by these standards or by federal, state, or local law may be waived in the manner described below. A juvenile's right to counsel may not be waived.

B. For purposes of this part:

1. A "mature respondent" is one who is capable of adequately comprehending and participating in the proceedings;

2. An "immature respondent" is one who is incapable of adequately comprehending and participating in the proceedings because of youth or inexperience. This part does not apply to determining a juvenile's incapacity to stand trial or otherwise partici-

pate in delinquency proceedings by reason of mental disease or defect.

C. Counsel for the juvenile bears primary responsibility for deciding whether the juvenile is mature or immature. If counsel believes the juvenile is immature, counsel should request the court to appoint a guardian *ad litem* for the juvenile.

D. A mature respondent should have the power to waive rights on his or her own behalf, in accordance with Standard 6.2. Subject to Standard 6.3, the rights of an immature respondent may be waived on his or her behalf by the guardian *ad litem*.

### 6.2 Waiver of the rights of mature respondents.

A. A respondent considered by counsel to be mature should be permitted to act through counsel in the proceedings. However the juvenile may not personally waive any right:

1. except in the presence of and after consultation with counsel; and
2. unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding the decision. If the parent requires an interpreter for this purpose, the court should provide one.

B. The decision to waive a mature juvenile's privilege against self-incrimination; the right to be tried as a juvenile or as an adult where the respondent has that choice; the right to trial, with or without a jury; and the right to appeal or to seek other postadjudication relief should be made by the juvenile. Counsel may decide, after consulting with the juvenile, whether to waive other rights of the juvenile.

### 6.3 Waiver of the rights of immature respondents.

A. A respondent considered by counsel to be immature should not be permitted to act through counsel, nor should a plea on behalf of an immature respondent admitting the allegations of the petition be accepted. The court may adjudicate an immature respondent delinquent only if the petition is proven at trial.

B. The decision to waive the following rights of an immature respondent should be made by the guardian *ad litem*, after consultation with the respondent and counsel: the privilege against self-incrimination; the right to be tried as a juvenile or as an adult, where the respondent has that choice; the right to a jury trial; and the right to appeal or seek other postadjudication relief. Subject to subsection A. of this standard, other rights of an immature respondent should be waivable by counsel after consultation with the juvenile's guardian *ad litem*.

#### 6.4 Recording.

A. Express waivers should be executed in writing and recorded. When administering a waiver of the juvenile's right, the judge or other official should:

1. ascertain whether the waiver is being made by the juvenile or by the guardian *ad litem* on the juvenile's behalf;
2. if the juvenile is waiving a right on his or her own behalf, require counsel to affirm belief in the juvenile's capacity to do so, and affirm that counsel has otherwise complied with the requirements of this part; and
3. ascertain that the juvenile or guardian *ad litem*, as the case may be, is voluntarily and intelligently waiving the right in the presence of and after advice of counsel.

B. Waivers should be executed in the dominant language of the waiving party or, if executed in English and the waiving party's dominant language is not English, should be accompanied by a translator's affidavit certifying that he or she has faithfully and accurately translated all conversations between the juvenile, parent[s], guardian *ad litem*, counsel, and the court with respect to the waiver decision. The affidavit should be recorded.

#### The Role of Parents and Guardians *Ad Litem* in the Delinquency Proceedings

#### 6.5 The role of parents.

A. Except as provided in subsection B.,

1. the parent of a delinquency respondent should have the right to notice, to be present, and to make representations to the court either *pro se* or through counsel at all stages of the proceedings;
2. parents should be encouraged by counsel, the judge, and other officials to take an active interest in the juvenile's case. Their proper functions include consultation with the juvenile and the juvenile's counsel at all stages of the proceedings concerning decisions made by the juvenile or by counsel on the juvenile's behalf, presence at all hearings, and participation in the planning of dispositional alternatives. Subject to the consent of the mature juvenile, parents should have access to all records in the case. If the juvenile does not consent, the court should nevertheless grant the parent access to records if they are not otherwise privileged, and if the court determines, *in camera*, that disclosure is necessary to protect the parent's interests.

B. The court should have the power, in its discretion, to exclude or restrict the participation of a parent whose interests the court has

determined are adverse to those of the respondent, if the court finds that the parent's presence or participation will adversely affect the interests of the respondent.

C. Parents should be provided with necessary interpreter services at all stages of the proceedings.

#### 6.6 "Parent" defined.

The term "parent" as used in this part includes:

A. the juvenile's natural or adoptive parents, unless their parental rights have been terminated;

B. if the juvenile is a ward of any person other than a parent, the guardian of the juvenile;

C. if the juvenile is in the custody of some person other than a parent, such custodian, unless the custodian's knowledge of or participation in the proceedings would be detrimental to the juvenile; and

D. separated and divorced parents, even if deprived by judicial decree of the respondent juvenile's custody.

#### 6.7 Appointment of guardian *ad litem*.

A. The court should appoint a guardian *ad litem* for a juvenile on the request of any party, a parent, or upon the court's own motion:

1. if the juvenile is immature as defined in Standard 6.1 B. 2.;
2. if no parent, guardian, or custodian appears with the juvenile;
3. if a conflict of interest appears to exist between the juvenile and the parents; or
4. if the juvenile's interest otherwise requires it.

B. The appointment should be made at the earliest feasible time after it appears that representation by a guardian *ad litem* is necessary. At the time of appointment, the court should ensure that the guardian *ad litem* is advised of the responsibilities and powers contained in these standards.

C. The function of a guardian *ad litem* is to act toward the juvenile in the proceedings as would a concerned parent. If the juvenile is immature, the guardian *ad litem* should also instruct the juvenile's counsel in the conduct of the case, and may waive rights on behalf of the juvenile as provided in Standard 6.3. A guardian *ad litem* should have all the procedural rights accorded to parents under these standards.

D. The following persons should not be appointed as a guardian *ad litem*:

1. the juvenile's parent, if the parent's interest and the juvenile's interest in the proceedings appear to conflict;



2. the agent, counsel, or employee of a party to the proceedings, or of a public or private institution having custody or guardianship of the juvenile; and

3. an employee of the court or of the intake agency.

E. Courts should experiment with the use of qualified and trained nonattorney guardians *ad litem*, recruited from concerned individuals and organizations in the community on a paid or volunteer basis.

#### 6.8 The parent's right to counsel.

A. A parent should receive notice of the right to counsel when he or she receives the petition or the summons and also, if the parent appears without counsel, at the start of all judicial hearings. The notice should state that the juvenile's counsel represents the juvenile rather than the parent, that if the parent wishes, he or she has a right to be advised and represented by his or her own counsel, to the extent permitted by Standard 6.5, and that a parent who is unable to pay for legal assistance may have it provided without cost, to the extent permitted by Standard 6.5.

B. A parent's counsel may be present at all delinquency proceedings but should have no greater right to participate than a parent does under Standard 6.5.

#### 6.9 Appointment of counsel for parent unable to pay.

A. The court may appoint counsel for a respondent's parent who does not waive that right and who is unable to obtain adequate representation without substantial hardship to the parent or family.

B. A preliminary determination of the parent's eligibility for court-appointed counsel should be made at the earliest feasible time after the parent's right to appointed counsel arises. The final determination should be made by the judge or an officer of the court selected by the judge. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

C. The ability to pay part of the cost of adequate representation should not preclude eligibility. The court may appoint counsel on the condition that the recipient make some reasonable payment in accordance with financial capabilities.

#### 6.10 Waiver of the parent's rights.

A. Any right accorded to a parent by these standards or under federal, state or local law may be waived. A parent may effectively waive a right only if the parent is fully informed of the right and

voluntarily and intelligently waives it. The failure of a parent who has the right to counsel to request counsel should not of itself be construed to constitute a waiver of that right.

B. A parent's waiver of counsel should not be accepted unless it is in writing and recorded. If the waiving party's dominant language is not English, the safeguards described in Standard 6.4 B. of this part should apply.

## PART VII: JUVENILE COURT CALENDARING

### 7.1 Priorities in scheduling juvenile court cases.

A. To effectuate the right of juveniles to a speedy resolution of disputes involving them, and the public interest in prompt disposition of such disputes, juvenile court cases should always be processed without unnecessary delay.

B. Insofar as is practicable, hearing priorities should favor the following categories:

1. young, immature, and emotionally troubled juveniles;
2. juveniles who are detained or otherwise removed from their usual home environment; and
3. juveniles whose pretrial liberty appears to present unusual risks to themselves or the community.

### 7.2 Court control; duty to report.

Control over the juvenile court calendar should be vested in the court. The official charged with representing petitioners should be required to file periodic reports with the court setting forth the reasons for delay as to each case for which no trial has been requested within a prescribed time following the filing of the petition. Such official should also advise the court of facts relevant in determining the order of cases on the calendar.

### 7.3 Calendaring aims and methods.

A. The court should endeavor by control of the calendar to ensure a regular and efficient flow of cases through the court.

B. Every reasonable effort should be made to ensure that the same judge who presides at the adjudication hearing presides at all post-adjudication proceedings.

C. Calendaring should be designed, insofar as is practicable, to avoid having a judge preside at the adjudication hearing who has had earlier prejudicial contacts with the case.

**7.4 Calendaring of pretrial motions; pretrial conference.**

A. Motions in civil or criminal proceedings that are ordinarily in writing should also be made in writing in delinquency proceedings.

B. In appropriate cases the court should hold an omnibus hearing prior to adjudication, in order to:

1. ascertain whether the parties have completed the discovery authorized in Part III and, if not, make appropriate orders to expedite completion;
2. make rulings on any motions or other requests then pending, and ascertain whether any additional motions or requests will be made at the hearing;
3. ascertain whether there are any procedural or constitutional issues which should be considered before trial; and
4. ensure compliance with the standards regarding provision of counsel.

C. Whenever proceedings at trial are likely to be protracted or unusually complicated, or upon request by agreement of counsel, the court should hold one or more pretrial conferences, with counsel present, to consider such matters as will promote fair and expeditious proceedings.

## *Standards with Commentary*

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### PART I: REPORT, PETITION, AND SUMMONS

#### 1.1 Reports.

No delinquency petition should be filed unless a report in the matter has first been filed with the intake department and the prescribed procedures for intake and prosecution screening have been complied with. A delinquency report is a sworn written statement of the essential facts constituting the grounds of a juvenile's alleged delinquency. Where feasible, it should be signed by a person who has personal knowledge of the facts; otherwise it may be made by a person who is informed of the facts and believes that they are true.

#### *Commentary*

This standard distinguishes between the delinquency report, a preliminary writing which initiates screening procedures, and the delinquency petition, the formal pleading which initiates judicial action. Unlike the "complaint" in civil and criminal proceedings, the report can never function as a pleading.

#### Background: Civil and Criminal Proceedings

In civil proceedings there is only one formal document, the complaint, which initiates judicial proceedings. It is analogous to a delinquency petition. In criminal proceedings a "complaint" is a written statement constituting a preliminary accusation against an offender and generally sworn before a magistrate or other judicial officer. In some cases—usually when a violation of a minor state or municipal ordinance is involved—the complaint or a warrant issued on the basis of the complaint will constitute the sole charging document. Amsterdam, Segal and Miller, *Trial Manual for the Defense of Criminal Cases* § 9 (1967). In misdemeanor and felony cases, however, the complaint generally serves only to afford the magistrate a basis to decide

whether there is probable cause to issue an arrest warrant, to provide jurisdiction for the preliminary arraignment and examination, and to determine if there is probable cause to bind the accused over to a court of record. *Id.* §§ 11, 18. In both misdemeanor and felony cases the complaint alone generally cannot invoke the trial jurisdiction of a criminal court of record. A prosecution in those courts can only be initiated by a second document, either a prosecutor's information or a grand jury indictment.

The complaint sworn before the magistrate may be based on personal knowledge or on information and belief. See, *e.g.*, McKinney's New York Criminal Procedure Law § 100.15 (1971). At the preliminary arraignment, which takes place shortly after the complaint is sworn, the accused will usually be informed of the charges in the complaint. If the accused is arrested without a warrant, the complaint will be sworn out when the arrested individual is brought before the magistrate. Amsterdam, *supra* at §§ 6, 12, 18.

#### Juvenile Proceedings

Although some juvenile court acts require a written complaint prior to the filing of a delinquency petition, see, *e.g.*, Cal. Welf. & Inst'n's Code § 653 (1971); D.C. Code § 16-2305 (Supp. 1972); D.C. Rules Governing Juvenile Procedure, Rule 3 (1972); Wyo. Stat. Ann. § 14-115.12 (1971), most do not require that the complaint be formalized in writing, and none require that it be sworn. The model juvenile court acts assume that the complainant will transmit the complaint in some fashion to the court or intake department. See U.S. Children's Bureau, "Legislative Guide for Drafting Family & Juvenile Court Acts" §§ 13(a), 21(a) (1969) (hereafter, "Legislative Guide"); National Council on Crime and Delinquency, "Standard Juvenile Court Act" §§ 12, 16, 17 (1959) (hereafter, "Standard Act"); Uniform Juvenile Court Act §§ 6, 15, 17(b) (1968) (hereafter, "Uniform Act"). Some juvenile courts have developed rudimentary model complaints which serve as checklists for screening referrals to the court, and also as guidelines for drafting formal petitions. National Juvenile Law Center, "Law and Tactics in Juvenile Cases" § 8.2 (1971). Most juvenile court acts do not require the complaint to be based on personal knowledge or information and belief.

This standard requires the report in juvenile delinquency proceedings to serve purposes similar to those of the complaint in the criminal process. The report is the basis for intake and prosecutorial screening procedures, and the basis for preliminary judicial actions in

the case, such as the issuance of process. The report also preliminarily informs the parties and counsel of the nature of the charges.

The requirement that the complainant sign the report on the basis of personal knowledge or information and belief enhances the trustworthiness of reports and discourages anonymous and frivolous accusations; the oath requirement discourages perjury and false complaints. A sworn report may also be required by the Fourth Amendment, as in criminal proceedings, to establish probable cause for juvenile court arrest and detention orders. Officials receiving reports, whether they are located in the court, police station, or intake unit, should be empowered to administer oaths to complainants in delinquency cases.

The initial recipient of a report should forward a copy to the intake department. Depending upon the degree of formality required by intake officials, the report could then be sent to the juvenile and the parents, along with notice to appear at the department for intake discussions. In such a case, the report would serve as a form of preliminary notice to the juvenile. In cases where the intake staff decides to recommend the filing of a petition, they should forward a copy of the report to the petitioning authority for the latter's use in deciding whether a petition should be filed.

For the sources of Standard 1.1 see *Fed. R. Crim. P.* 3; Legislative Guide § 13(a); Model Rules, Rule 2; D.C. Code § 16-2305 (Supp. 1972); D.C. SCR-JUV, Rule 3 (1970).

## 1.2 Functions of petition and summons.

### A. The petition should serve the following purposes:

1. assist the parties to prepare adequately for trial and reduce surprise or disadvantage to the respondent;
2. provide a record of the allegations tried for purposes of the double jeopardy protection; and
3. enable the court to conduct an orderly and directed fact-finding hearing.

### B. The summons should serve the following purposes:

1. ensure the presence of all essential participants at the initial hearing and at all later stages of the proceedings; and
2. advise the parties of the contents of the petition.

C. A statement advising the parties and other participants of their legal rights should be included in or appended to either the petition or the summons.

### *Commentary*

Important procedural needs are served in delinquency proceedings

by the petition and summons. The petition is the document containing the formal allegations of delinquency which will be tried if not admitted by the juvenile.

The summons is the form of process which requires the presence in court of all the essential participants. The petition should be served along with the summons, to notify the persons summoned of the nature of the proceedings. See Standards 1.4 and 1.5.

### The Petition

The general purposes served by delinquency petitions are set forth in subsection A. First, the petition should enable the parties to prepare adequately for trial. The advance notice to the respondent and the parents of the delinquency allegations is constitutionally mandated:

Due process of law requires notice . . . . It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet. *In re Gault*, 387 U.S. 1, 33-34 (1967).

Second, the petition should provide a record of the allegations tried for purposes of the double jeopardy protection. The fifth amendment double jeopardy ban has been applied to juvenile proceedings in two situations: 1. where there has already been a juvenile court proceeding and a subsequent criminal complaint is brought based on the same conduct, see *Breed v. Jones*, 421 U.S. 519 (1975); and 2. where there have been repeated juvenile court trials. *Tolliver v. Judges of Family Court*, 4 Cal. 3d 370, 482 P.2d 664 (1971); *Anonymous v. Superior Court of Shasta County*, 10 Ariz. App. 243, 457 P.2d 956 (1969). In delinquency proceedings the petition must identify the conduct and offenses alleged with sufficient particularity to protect the respondent from subsequent prosecution as to those matters.

Finally, the petition should enable the court to conduct an orderly and directed fact-finding hearing. Maximum fairness to the respondent and accuracy in adjudication and disposition will be achieved when the court has before it all relevant information, but no extraneous matters. The petition can assist in achieving this goal by highlighting for all parties and for the court the specific matters at issue. National Council on Crime and Delinquency, "Procedure and Evidence in the Juvenile Court: A Guidebook for Judges" 13 (1962). When the allegations of a petition are vague, the court may have

difficulty in determining the issues before it and as a consequence judicial time may be wasted and extraneous matters heard.

### The Summons

Although practice varies among the states, civil suits are generally commenced by service of process (summons). Statutes usually also require service upon the defendant of the initial pleading (complaint), either with the summons or within a prescribed time thereafter. James, *Civil Procedure* § 1.16, 46 (1965). Service of process in civil proceedings serves two purposes: first, it is the means by which personal jurisdiction is acquired; second, it notifies the parties of the time and place of and the issues to be met at the proceedings and affords them a reasonable opportunity to be heard.

In criminal proceedings the above functions may be performed in a variety of manners. In some jurisdictions, the accused is first notified of the charges at the preliminary arraignment or preliminary hearing. Amsterdam, Segal, and Miller, *Trial Manual for the Defense of Criminal Cases—II* § § 5-22 (1971). In the federal courts a defendant against whom an arrest warrant is executed has the right to be informed of the content of the warrant by the arresting officer; if a summons is employed in lieu of an arrest warrant, service will be made by delivering a copy of the summons (describing the offense, stating the time and place of the next hearing) to the defendant, either personally or by leaving a copy at the last or usual place of abode or by mail. *Fed. R. Crim. P.* 4(c) (3).

Unless a delinquency case is initiated by arrest of the respondent without a warrant, in all but exceptional circumstances it should be commenced by the issuance of a summons, as in civil proceedings, and not by issuance of an arrest warrant. See Standard 1.5E. Standard 1.2B. sets forth the two purposes to be served by the summons. First, the summons should be calculated to ensure the presence of the respondent and other essential participants including the parents, at the initial hearing, described in Standard 2.2, and at all subsequent stages of the proceedings. Due process of law requires that the respondent appear before the court. *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Harris v. Souder*, 233 Ind. 287, 119 N.E.2d 8 (1954); Fox, *The Law of Juvenile Courts in a Nutshell* § 17 at 73 (1971). The parents, too, may be constitutionally entitled to notice and an opportunity to be present and to participate to some extent in the proceedings, and may have an important contribution to make in the interest of the juvenile. See Part VI.

The summons should also notify the parties of the contents of the petition. As the Supreme Court stated in *Gault*, due process requires



that the juvenile and parents “be notified, in writing, of the specific charge or factual allegations to be considered at the hearing. . . .” *In re Gault*, 387 U.S. 1, 33 (1967). Notification of the contents of the petition is essential both to the court’s acquisition of jurisdiction over the respondent, and to the ability of the respondent and the parents to prepare for the hearing.

#### Notice of Legal Rights

Although the respondent and other participants may have been advised of their legal rights at a pre-judicial stage of the process—for example, upon arrest or at an intake conference—it is important that they receive formal written notification early in the proceedings. There will be some cases—for example, when there has been no arrest and a petition is filed without a prior intake conference—in which the summons will present the first opportunity to advise the participants of their legal rights.

#### 1.3 Contents of the petition.

A. The petition should set forth with particularity all factual and other allegations relied upon in asserting that the juvenile is within the juvenile court’s jurisdiction, including:

1. the name, address, and date of birth of the juvenile;
2. the name and address of the juvenile’s parents or guardian and, if the juvenile is in the custody of some other person, such custodian;
3. the date, time, manner, and place of the acts alleged as the basis of the court’s jurisdiction;
4. a citation to the section and subdivision of the juvenile court act relied upon for jurisdiction; and
5. a citation to the federal, state, or local law or ordinance, if any, allegedly violated by the juvenile.

B. The petition should state the kinds of dispositions to which the respondent could be subjected if the allegations of the petition were proven, such as transfer for criminal prosecution,\* probation, or removal from the home.

#### *Commentary*

##### General Principle

In civil proceedings, the specificity required of the pleadings varies among jurisdictions. The pleadings may never contain solely legal

\*These standards were drafted before the Supreme Court’s decision in *Breed v. Jones*, 421 U.S. 519 (1975).

conclusions, but the detail required depends on the nature of the action. James, *Civil Procedure* § 2.8 at 72-6 (1965). Under the Federal Rules of Civil Procedure the pleading need only state the jurisdictional facts and contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P.* 8.

In criminal proceedings, the charge must set forth with particularity the acts constituting the offense charged, including allegations as to each essential element of the offense. The information must clearly identify the statute allegedly violated and must accurately identify the defendant. *Russell v. United States*, 369 U.S. 749 (1962); Indictments and Informations 42 *C.J.S.* §§ 68, 79, 90.

This standard is based upon the view that notice in delinquency petitions should be as full and clear as is required in criminal proceedings. As the Supreme Court has said,

Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicatory in nature. Among these are the rights to appropriate notice. *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971).

But the law and practice in delinquency proceedings has not always measured up to this standard. The N.C.C.D. "Standard Juvenile Court Act" typically requires only that the petition "shall set forth plainly . . . the facts which bring the child within the purview of this Act." Standard Act § 12.3. See also Ill. Ann. Stat. ch. 37 § 704-1 (1965); Minn. Stat. Ann. § 260.131(3) (1970); Uniform Act § 21(1). A few cases, mostly decided prior to *Gault*, have upheld the legal sufficiency of petitions containing only generalized allegations. See, e.g., *In re Nichols*, 179 A.2d 915 (D.C. Mun. App. 1962); *State v. Johnson*, 194 N.W. 202 (Iowa 1923); *In re Henderson*, 199 N.W.2d 111 (Iowa 1972); *In re Cromwell*, 194 A.2d 88 (Md. 1963). But the current trend, particularly in the case law, has been to require the petition to allege all jurisdictional facts with particularity. See, e.g., *In re Coward*, 254 A.2d 730 (D.C. App. 1969); *D.R.W. v. State*, 262 So. 2d 701 (Fla. App. 1972); *Allen v. Ladson*, 165 S.E.2d 881 (Ga. App. 1969); *In the Interest of Carson*, 294 N.E.2d 75 (Ill. App. 1973); D.C. SCR-JUV. Rule 7(c) (1970); Minn. Rules for Juvenile Proceedings, Rules 3-2(1) (a) (iii), 3-3 (1970); N.Y. Fam. Ct. Act § 731(a) (1963).

The requirement of particularity in setting forth the allegations relied upon and the dispositions to which the respondent might be subjected does not preclude the customary requirement that all pleadings be in language that is simple and succinct. Generally,

the court will strike pleadings that are unduly wordy, vague, or repetitious.

Describing the allegations of delinquency with "particularity" is necessary in delinquency proceedings for the same reasons as in criminal prosecutions. "The primary value of definiteness is . . . to give adequate opportunity for preparation and to prevent surprise, helplessness, and disadvantage to the respondent." N.C.C.D., *Procedure and Evidence in the Juvenile Court: A Guidebook for Judges* 12-13 (1962). Detailed notice also assists counsel in deciding whether to advise the juvenile to admit or contest the pleadings, guards against double jeopardy and may forestall the possibility that "magnified fears be engendered in the mind of the child." Antieu, "Constitutional Rights in Juvenile Courts," 46 *Cornell L.Q.* 387, 410 (1961).

The argument most frequently cited against a requirement of particularity is that the petition is often prepared by a layperson who is unaware of the requirements of legal sufficiency. See, e.g., *In the Interest of A.R.*, 57 N.J. 71 (1970). However, since under these standards the prosecuting attorney is responsible for the preparation of petitions (Standard 1.4), compliance with this standard should not be burdensome.

#### Specific Items

A. Name, address, and date of birth. A statement of these facts is necessary for two reasons. First, such a statement serves to identify the respondent accurately, both for double jeopardy and jurisdictional purposes. Second, since juvenile court jurisdiction rests in part on the age of the juvenile, it is essential that the petition specifically allege the facts necessary to establish this aspect of the court's subject matter jurisdiction.

B. Name and address of parents. Juvenile court acts uniformly require that the petition state the name and address of the juvenile's parents, guardian, or custodian. If the juvenile is neither in the custody of the parents nor of a legal guardian, many of the statutes require only a statement pertaining to the custodian. See, e.g., Texas Rev. Civ. Stat. Ann. Art. 2338-1 § 7 (Vernon 1971); Wyo. Stat. Ann. § 14-115.13 (1971). Other statutes require the petition to state the names and addresses of both the parents (or guardian) and the custodian. See, e.g., Ill. Ann. Stat. ch. 37, § 704-1 (Smith-Hurd 1965); Minn. Stat. Ann. § 260.131 (1970); Standard Act § 12(3).

Since juvenile delinquency hearings concern not only the respondent but also the parents and those functioning in parental roles, see Part VI, information concerning the identity and whereabouts of the parents or custodian is a vital element of the record.

C. Date, time, manner and place of the acts. A criminal charge must contain allegations as to each element of the offense charged and must state with some particularity the acts constituting the alleged offense. Pursuant to this general rule a criminal information must state the approximate date and time, the place, and the manner of the alleged acts. Similarly, several juvenile court acts require that a delinquency petition specify the place, time and manner of the alleged offense. Colo. Rules of Juv. Proc., Rule 12(b) (1970); Minn. Rules for Juv. Proc., Rule 3-2(1) (a) (iii) (1970); N.Y. Fam. Ct. Act § 731 (a) (1963); Model Rules, Rule 6. Other statutes may imply this requirement by providing that the petition state the facts constituting the alleged offense with "particularity" or "specificity."

The trend in the case law is also to require delinquency petitions to include allegations as to these matters. In *Gault*, the Supreme Court held that the juvenile was constitutionally entitled to notice "of the specific charge or factual allegations to be considered at the hearings." The Court went on to say that the petition must set forth the alleged misconduct with particularity and, to meet due process requirements, notice must be such as "would be deemed constitutionally adequate in a civil or criminal proceeding." *In re Gault*, 387 U.S. 1, 33 (1967). Numerous state cases have applied a requirement of particularity to juvenile delinquency petitions. Some of these cases have reasoned that a juvenile delinquency proceeding is criminal, or "quasi-criminal" in nature, and that therefore the petition must meet the same requirements of specificity as a criminal indictment. See, e.g., *Allen v. Ladson*, 119 Ga. App. 44, 165 S.E.2d 881 (1969); *In re Walsh*, 59 Misc. 2d 917, 300 N.Y.S.2d 859 (1969); *State v. Sluder*, 463 P.2d 594 (Ore. 1970). Other courts have found petitions insufficient by standards applicable to civil pleadings, for example, because all the allegations were conclusory. See, e.g., *Berkeley v. State*, 473 S.W.2d 346 (Tex. Civ. App. 1971); *Viall v. State*, 243 S.W.2d 187 (Tex. Civ. App. 1967). Although the courts differ in their reasoning, there is a clear and growing body of case law indicating that the petition should specifically describe the juvenile's alleged misconduct. These cases generally support the requirement of Standard 1.3 A. 3.

D. Citation to the relevant juvenile court act section. The requirement in subsection A. 4. is important when the court's jurisdiction may rest on any one of several prescribed types of delinquent conduct, such as conduct in violation of penal law. Although most juvenile court statutes do not require the petition to cite the precise section and subdivision of the juvenile court act relied upon for jurisdiction, several of the more recent statutes and court rules do. See, e.g., Cal. Welf. & Inst'n's Code § 656 (c) (1972); Minn. Rules for

Juv. Proc., Rules 3-2 (1) (a) (i), 3-2 (1) (b) (i), 3-3 (1970). Several recent cases have ruled similarly. See *In the Interest of J.M.*, 57 N.J. 442 (1971); *In the Interest of Meyer*, 204 N.W.2d 625 (Iowa, 1973).

E. Citation to federal, state, or local law violated. The Federal Rules of Criminal Procedure, Rule 7(c) requires that the information cite the statute allegedly violated by the defendant's conduct. Under state criminal procedures it may not be necessary to specify the exact section of the statute allegedly violated, but the language of the information must be sufficiently specific to bring the charge within the particular part of the statute on which it is based. 41 Am. Jur. 2d § 88 (1968). Delinquency petitions are usually based on an alleged violation of a federal, state, or local criminal statute or ordinance. Several juvenile court statutes require a citation to the underlying law allegedly violated by the juvenile's conduct. See, e.g., Colo. Rules for Juv. Proc., Rule 12 (b) (1970); D.C. Code § 16-2305 (d) (1970); D.C. SCR-JUV., Rule 7 (c) (2) (1970); Model Rules, Rule 6. The cases are divided on the question of whether a petition is legally insufficient because it fails to cite the specific penal law violated by the juvenile's alleged misconduct. See, e.g., *In re Hitzemann*, 281 Minn. 275, 161 N.W.2d 542 (1968); *State In the Interest of L.B.*, 99 N.J. Super. 589, 240 A.2d 709 (1968); *Sorrels v. Steele*, 506 P.2d 942 (Okla. 1973); *Minor v. Clark County Juvenile Court*, 490 P.2d 1248 (1971). *Gault* does not resolve this issue. The Court in *Gault* held that the juvenile was entitled to notice that would be constitutionally sufficient in a civil or criminal proceeding. Although allegations concerning all elements of the penal law allegedly violated would be necessary if criminal standards were imposed, this would not be true under civil rules, which generally do not call for the pleading of domestic law. The Court's statement in *Gault* that the juvenile should be apprised of the "specific issues" to be met at trial might or might not be construed to require a citation to the underlying penal law violation.

The better view is that the petition should refer precisely to the underlying law that the respondent has allegedly violated. As Dorsen and Rezneck have noted, conduct may often violate several federal, state, or local laws, ordinances, rules, or regulations. Dorsen and Rezneck, "*In re Gault and the Future of Juvenile Law*," 1 *Fam. L.Q.* 1, 13, 16 (1967). Since different offenses contain different elements and since the proof required at trial will vary according to the offense alleged, it is imperative that the specific underlying statute be identified for the parties and the court. Without this information, counsel will be disadvantaged in preparing for trial, and the court's ability to conduct an orderly and directed fact-finding hearing will be diminished. Also, a standard which requires the petitioner to cite a

specific law violation will encourage the early screening out of unsupported or legally deficient petitions.

F. Statement as to possible dispositions. Although in criminal proceedings there is no practice or requirement that the indictment or information contain any statement as to the penalties to which the accused would be subject if convicted, subsection B. imposes such a requirement on delinquency petitions. Unfortunately, many respondents and their parents are not aware of the serious consequences that may befall a juvenile who is adjudicated delinquent. To some, the image of the juvenile court may be cloaked in a humane garb which disguises its coercive powers. The purpose of subsection B. is to notify the participants of the seriousness and potential consequences of the proceedings. Although this risks causing needless alarm to some families by stating a range of consequences that, given the circumstance of particular respondents, may not necessarily be imposed, this risk seems outweighed by the value of full disclosure to all respondents and their parents.

#### Matters the Petition Should Omit

1. Facts supporting allegations as to juvenile's need for care. Some juveniles are adjudged to have committed the alleged offense, *and* to be "in need of care or rehabilitation." Where this is the case, some of the statutes and cases have held that the petition must allege this jurisdictional fact. See, *e.g.*, Legislative Guide § 14 (e) (1); Uniform Act § 21 (4); Standard Act § 12 (3) (d); Cal. Welf. & Inst'n's Code § 656 (1971); D.C. Code § 16-2305 (d) (1970); D.C. SCR-JUV. Rule 7 (c) (1970). None require that this allegation be made with particularity.

Similarly, Standard 1.3 A. contemplates that states that base delinquency jurisdiction in part upon proof of "need of care" should require petitions to allege this factual element, but that such allegations should be exempt from the general requirement of particularity. The reason for this is that the particular facts that might be alleged to support the allegation relate essentially to the juvenile's social, psychological, and family circumstances. Such data are appropriate for the court's attention at disposition, but might be prejudicial if introduced prior to the court's decision on whether the juvenile has committed the acts alleged in the petition. It is therefore more appropriate to allege the particulars supporting an allegation that the juvenile needs care and rehabilitation in a supplemental petition served after the "occurrence facts" have been found, and prior to the subsequent need of care and disposition hearings. Legislation including a jurisdictional delinquency requirement of "need of

care" generally contemplates distinct hearing stages on each of these three issues. See, *e.g.*, Legislative Guide § 32; Comment, "The Consent Decree and New York Family Court Procedure in J.D. and PINS Cases," 23 *Syracuse L. Rev.* 1211, 1216-17 (1972).

2. Statements relating to detention or shelter care. Many juvenile court statutes and court rules require that when the juvenile is in detention or shelter care at the time the petition is filed, the petition must state that fact and note the place of detention and the time and manner of the taking into custody. Legislative Guide § 14 (e) (4); Uniform Act § 12(4); Cal. Welf. & Inst'ns Code § 656 (g) (1971); Minn. Rules for Juv. Proc., Rule 7(c) (1970). This requirement is imposed in part to inform the parents and counsel of the detention in order that they may contact and confer with the juvenile. While this information regarding detention should be communicated, due process notice requirements do not mandate its inclusion in the petition, nor does this standard. Under some circumstances inclusion might be prejudicial, by suggesting to the trial judge that the police were sufficiently certain of the gravity and/or legal sufficiency of the allegations to impose detention. Moreover, other provisions in juvenile court statutes generally require that notice of detention or shelter care be given to both the court and parents immediately upon delivery of the juvenile to the detention or shelter care facility. Legislative Guide § 21; Standard Act § 17; Model Rules, Rule 12; Uniform Act § 15. Thus, this information will be communicated even if not included in the petition. Lastly, analytical clarity is best served if such information, which is unrelated to the alleged offense, is not contained in the petition.

For the sources of this standard, see Legislative Guide § 14(e); Minn. Rules for Juv. Proc., Rule 3-2 (1970); Cal. Welf. & Inst'ns Code § 656 (1971); D.C. Code § 16-2305 (d) (1970); D.C. SCR-JUV, Rule 7(c)(2) (1970); Model Rules, Rule 6; Ill. Ann. Stat. ch. 37, § 704-1(3) (Smith-Hurd 1972).

#### 1.4 Filing and signing of the petition.

Petitions alleging delinquency should be prepared and filed by the prosecuting attorney and should bear the prosecuting attorney's signature to certify that he or she has read the petition and that to the best of his or her knowledge, information, and belief there is good ground to support it.

#### *Commentary*

The initiation and filing of delinquency petitions varies widely among jurisdictions in current juvenile court practice. Of eleven juve-

nile court acts studied, three require the prosecuting attorney to file the petition: D.C. Code Ann. § 16-2305 (1966); Tex. Fam. Code Ann. § 53.04 (Vernon's 1971); Wyo. Stat. Ann. § 14-115.13 (Supp. 1971); four allow anyone to file the petition: Colo. Rev. Stat. Ann. § 22-3-1 (1963); Conn. Rules of Juv. Ct., Art. II (1968); Ill. Ann. Stat. ch. 37, § 704-1 (Smith-Hurd, 1972); Ohio Rev. Code Ann. § 2151.27 (Page 1968); one allows anyone to file the petition but requires the prosecuting attorney to draft it: Minn. Stat. Ann. § 260.131 (West, 1967); one restricts those authorized to file the petition to four categories—victims, parents, police officers, and authorized agencies: N.Y. Family Ct. Act § 733 (McKinney's 1963); one authorizes only the probation officer to file the petition: Cal. Welf. & Inst'ns Code § 650 (West Supp. 1972); and one requires the juvenile court to authorize the petition: Mo. Ann. Stat. § 211.081 (1962).

Under most juvenile court acts the facts set forth in the petition must be verified by oath or affidavit of the party authorized to file the petition, or supported by affidavit of the complainant. However, one court has held that failure to verify the petition does not affect the juvenile court's jurisdiction. *In re Linda D.*, 3 Cal. App. 3d 567, 83 Cal. Rptr. 544 (1970). Most model juvenile court acts require a verified petition. Model Rules, Rule 6; Standard Act § 12; Uniform Act § 21.

This standard requires the prosecutor to prepare, file, and sign the delinquency petition instituting judicial action against the juvenile. The modern trend in criminal procedure, as recognized by a number of authorities, is to vest such charging responsibility in the prosecutor or a member of the prosecutor's staff. See ABA, *Standards Relating to the Prosecution Function* §§ 3.4, 3.9 (Tent. Draft, 1970); National Advisory Commission on Criminal Justice Standards and Goals, *Standards on Courts* § 1.2 (1973); A.L.I., *Code of Pre-arrestment Procedure* § 6.02 (Tent. Draft, 1966). There are many reasons for this choice. The prosecutor is a professionally trained, responsible public official and a lawyer. As the Legislative Guide notes, the prosecutor is the only person involved in the preliminary screening process with the expertise to determine the legal sufficiency of the accusations against the juvenile. Legislative Guide Comments to § 13. In addition, the prosecutor will be responsible for conducting the state's case against the juvenile and should determine, at an early stage, whether there is sufficient evidence upon which to base a case and whether prosecution is desirable.

The standard departs from the trend of most juvenile court acts and model acts in rejecting the requirement that the petition be formally verified. Instead it follows civil practice in requiring the prosecuting attorney to sign all pleadings in lieu of verification or



affidavit procedures. Under *Fed. R. Civil P.* 11, the attorney's signature certifies that there are good grounds to support the pleading; the attorney is subject to disciplinary action for willful violation of the rule. This model was chosen for two reasons. First, these standards are unique in calling for a sworn report. See Standard 1.1. The sworn report will aid the prosecuting attorney in preparing the petition. In addition, by having a sworn report, the prosecutor should always be able to certify the petition on information and belief. (The petition may be filed with a copy of the sworn report attached to it in support of its factual allegations.) Further, these standards allow the prosecutor to file the petition, thereby eliminating the need to have the petition sworn, a requirement which exists primarily in those situations where anyone may file a petition. The standard's reliance on the prosecuting attorney's signature to certify the petition is similar to the common law's recognition of the prosecutor's signature on a misdemeanor information as sufficient to certify the truth of the facts alleged therein. Anderson, *Wharton's Criminal Law and Procedure* § 1755 (1957). The prosecutor should, of course, be subject to disciplinary action if he or she certifies a petition substantially doubting the truthfulness of its allegations.

#### 1.5 The summons; subpoenas.

A. Upon the filing of a petition the clerk should issue a summons.

B. The summons should direct the parties to appear before the court at a specified time and place for an initial appearance on the petition. A copy of the petition should be attached to the summons.

C. A copy of the summons should be served by mail or in person.

D. The summons should be served upon the following persons:

1. the juvenile;

2. the juvenile's parents and/or guardian, and, if the juvenile is in custody of some other person whose knowledge or participation in the proceedings would be appropriate, such custodian;

3. the attorney[s] for the juvenile and parents, if the identity of the attorney[s] is known; and

4. any other persons who appear to the court to be necessary or proper parties to the proceedings.

E. No bench warrant should issue against a respondent unless it appears to the judge from the delinquency report, or from an affidavit or affidavits filed with the report, that there is probable cause to believe that the court has jurisdiction over the respondent, and:

1. the respondent fails to appear in response to a summons; or

2. the prosecuting attorney demonstrates to the court that issuance or service of a summons will result in the respondent's flight; or

3. a summons having issued, it is shown that reasonable efforts to serve the respondent, both personally and by mail, have failed.

F. [Upon application of a party, the clerk of the court should issue, and the court on its own motion should have the power to issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents, and other tangible objects at any hearing.] Without prejudice to the court's power to quash any subpoena for cause shown, the respondent's ability to subpoena public officials and records of the respondent's involvement with law enforcement, judicial, welfare, school, or other public agencies, including any reports or records, whether or not made in connection with the particular case, should not be impaired.

#### *Commentary*

##### Issuance by Clerk

Although some juvenile court acts say that "the court" should issue or "direct" that the summons be issued after a petition is filed, see Model Rules, Rule 20; Conn. Juv. Ct. Rules, Rule 5 (1968), others more specifically state that this is the clerk's function. See, e.g., Nev. Rev. Stat. § 62.140 (1973); Cal. Welf. & Inst'ns Code § 658 (1972). Clearly, this administrative function of the court should be performed by the clerk, not the judge. And issuance should be required as a matter of course in every case, to ensure that notice of the proceedings is communicated.

##### Content of Summons

In civil proceedings, service of process is the means by which the court acquires jurisdiction over the defendant and by which it satisfies the due process requirements that the defendant be given notice of the hearing and of the charges to be met therein, and that the defendant be given an opportunity to be heard. To serve these functions, the summons informs the defendant of the time and place of the hearing. A copy of the complaint accompanies or follows service of process. In a criminal case, notice of the time and place of the hearing and of the charges may be given at one or several points in the proceeding, including execution of the warrant or service of summons.

*In re Gault*, 387 U.S. 1 (1967), established for juvenile delinquency proceedings the requirement that the juvenile and parents receive notice in advance of the hearing of the issues to be met therein. The traditional mechanism by which the parties receive this notice is the summons.

Juvenile court acts uniformly require that the summons direct the parties to appear at a fixed time and place to answer the charges in the petition. Legislative Guide § 16; Standard Act § 14; Uniform Act §§ 22, 33; Ill. Ann. Stat. ch. 37, § 704-3 (1972); Cal. Welf. & Inst'ns Code § 638 (1972); D.C. Code § 16-2308 (1970). Many of the statutes also require that a copy of the petition accompany the summons. See, *e.g.*, Legislative Guide § 15 (b); Model Rules, Rule 21; Uniform Act § 22. Where this requirement is not imposed, the summons must nevertheless advise the parties of the substance of the petition. "Standard Act" § 14, Comment. In cases testing the sufficiency of the summons, the summons has been held to the same standards as the petition: it must advise the parties of the issues to be met at trial. *Application of Post*, 280 App. Div. 268, 113 N.Y.S.2d 475 (1952); *Jensen v. Hinkley*, 55 Utah 306, 185 P. 716 (1919).

Although in these standards the summons is for appearance at an initial hearing, rather than at the fact-finding hearing, the parties should have notice of the delinquency allegations as soon as possible. Requiring a copy of the petition to accompany the summons is the least burdensome means of ensuring adequate notice. Subsection B. adopts that practice.

#### Time and Method of Service

In civil proceedings, a variety of methods of service are available, including personal service; service upon a responsible person other than the defendant at the defendant's residence or place of business, coupled with mail service; affixation of the summons at such places, coupled with mail service; and, in certain limited situations, service by publication. See, *e.g.*, New York Civil Practice Law and Rules § 308 (McKinney's 1963).

In criminal proceedings, personal service is generally required; there can be no service by publication, and mail service is usually appropriate only for certain summary offenses. Amsterdam, Segal, and Miller, *Trial Manual for the Defense of Criminal Cases* § 6, 2-3 (1967); Calif. College of Trial Judges, "Bench Book: Misdemeanor Procedure" § 11.1, 136 (1971).

Most juvenile court acts provide that service be made in the manner provided for in the civil litigation process. Fox, *The Law of Juvenile Courts in a Nutshell* § 74 (1971). Generally, service must be made personally, if possible, or by certified mail, or, failing both these methods, by publication. See, *e.g.*, Legislative Guide, § 16; Standard Act § 14; Model Rules, Rule 20; Uniform Act § 23. Service by publication may only be made on the parents. The juve-

nile must be physically before the court if it is to act on the delinquency petition. Fox, *supra*, § 73.

The *Gault* case dealt only generally with the issues of method and timing of service. To comply with due process requirements, *Gault* held "Notice . . . must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded. . . ." *In re Gault*, 387 U.S. 1, 33 (1967). Juvenile court statutes generally impose time requirements on each method of service. The most typical time provisions are that personal service be made at least twenty-four hours, and service by certified mail at least five days, before the hearing. See, e.g., Legislative Guide § 16; Uniform Act § 23; N.Y. Fam. Ct. Act § 737 (1963).

Several cases have addressed the question of when the summons must be served under particular juvenile court statutes. At most, these cases set out the parameters of the right; thus, seventeen hours is insufficient notice, but twenty-three days is adequate. *Doe v. Alaska*, 487 P.2d 47 (1971); *Ex Parte DeGrace*, 425 S.W.2d 228 (Mo. 1968); *In re Coles*, 242 A.2d 903 (Pa. 1968); *Miller v. Quatsoe*, 332 F. Supp. 1269 (E.D. Wis. 1961).

Due process principles require that the methods chosen for notice should be those means best calculated actually to reach the attention of the respondent and to reach the respondent at the earliest possible moment. James, *Civil Procedure*, § 12.1 (1965). Subsection C. contemplates that personal or substituted (mail) service should be made in accordance with the state's regulations for civil litigation. But it implicitly rejects the method of service by publication. Not only is publication of doubtful efficacy in obtaining the presence of participants at the hearing, but it also violates the confidentiality of juvenile court proceedings. A published summons would necessarily include the juvenile's name and a summary of the allegations. The argument in favor of publication, that in some circumstances it may be needed to obtain the respondent's presence at the hearing and so provide a basis for personal jurisdiction, Uniform Act § 25, Comment, is unpersuasive because a bench warrant can serve this purpose. See Standard 1.5 E.

The standard sets no time requirements for service of summons. But see Standard 2.2, requiring that the initial hearing be held within a specified brief time after the petition is filed. At the initial hearing, the court will set a date for the fact-finding hearing.

#### Persons to Be Served

The constitutional requirement of notice in civil cases has been interpreted to require that those parties who are to be affected by a

judgment or order receive notice, *Hansberry v. Lee*, 311 U.S. 32 (1940), whereas in criminal proceedings the summons or warrant is addressed to the defendant alone. Who is entitled to service in juvenile delinquency proceedings is less clear.

The Supreme Court in *In re Gault* viewed the right to notice as belonging to both the parent and the juvenile. 387 U.S. 1, 33-34 (1967). A few courts have read *Gault* to mean that service is required only upon the person having custody and control of the juvenile. Annotation, 90 A.L.R.2d 293; *Prescott v. State*, 19 Ohio Stat. 184 (1969). However, most cases have found that due process also requires service on the juvenile in a delinquency case. See, e.g., *Ex parte Moilanen*, 104 Cal. App.2d 835, 233 P.2d 91 (1951); *In re Robinson*, 8 Cal. App.3d 783, 87 Cal. Rptr. 678 (1970); *Application of Post*, 280 App. Div. 268, 113 N.Y.S.2d 475 (1952); *R.L.R. v. State*, 487 P.2d 27 (Alaska 1971); *Casanova v. State*, 489 S.W.2d 727 (Tex. Civ. App. 1972).

Several of the statutes follow this latter view and extend the right to service to any juvenile who is over fourteen or is alleged to be delinquent: Cal. Welf. & Inst'ns Code § 658 (1972); D.C. Code § 16-2306 (1970); Minn. Rules for Juv. Proc., Rules 4-1, 4-6; Legislative Guide § 16. California alone expressly provides for service on the juvenile's attorney. Cal. Welf. & Inst'ns Code § 658 (1972).

The policy of Standard 1.5 D. is that the respondent's parents and others filling parent roles toward the respondent should receive notice of the proceedings. This is important both for the benefit of the respondent and to protect the parent/custodian's own interest at stake in the proceedings. See Part VI.

#### Bench Warrants

Standard 1.5 E. is addressed to the issuance of bench warrants ordering that a delinquency respondent be taken into custody and brought to court to answer in the proceedings. Juvenile court legislation typically contains a single provision empowering the court to endorse an order for "immediate custody" on a variety of grounds, without distinguishing among juveniles involved in neglect, PINS, and delinquency proceedings. An example is the Illinois Juvenile Court Act, permitting the court to issue a custody warrant whenever it

finds that the conduct and behavior of the minor may endanger the health, person, welfare, or property of himself or others or that the circumstances of his home environment may endanger his health, person, welfare or property. . . . Ill. Ann. Stat. ch. 37, § 703-1(2) (Smith-Hurd 1972).

See also Model Rules, Rule 12; Legislative Guide §§ 15(d), 20; Cal. Welf. & Inst'ns Code § 663 (1972). These broad powers are frequently subject to abuse in delinquency proceedings. See Fox, *supra*, §§ 98-99.

The subsection proceeds from two premises: first, that fourth amendment prescriptions upon seizures without probable cause apply to custody warrants issued in delinquency cases; and, second, that a court should not authorize taking a juvenile into custody unless that measure appears necessary to obtain personal jurisdiction over the juvenile. See Frankel, "Bench Warrants Upon the Prosecutor's Demand: A View From the Bench," 71 *Colum. L. Rev.* 403 (1971). In light of the widely recognized evils of pretrial detention of young persons, neither premise is controversial. In practice, most detained juveniles are taken into custody by law enforcement officers acting without court warrant. Although the subject of prepetition police procedures is outside the scope of this volume, it would appear advisable to encourage the use of field summonses in lieu of unnecessary detentions at that stage.

Standard 1.5 E. is adapted from Rule 4, Proposed Amendments to the Fed. R. Crim. P. (1974). See also S. Dak. Comp. Laws § 26-8-18 (1967); A.L.I. Model Code of Pre-arraignment Procedure § 6.04 (Tent. Draft No. 1, 1966).

#### Issuance of Subpoenas

In civil and criminal proceedings, the parties have ready access to the judicial subpoena power in order to obtain witnesses and documentary or tangible evidence necessary to the presentation of their case. See Fed. R. Crim. P. 17; Fed. R. Civ. P. 45. Many juvenile court statutes also address the parties' access to subpoenas. See Cal. Welf. & Inst'ns Code § 664 (1972); Fla. Rules of Juv. Proc., Rule 9.090(e) (Temp. Rules, 1972); Legislative Guide § 24; Uniform Act § 18.

The first sentence of Standard 1.5 F. is bracketed to indicate that its provisions are unnecessary if the state's general subpoena rules, either civil or criminal, apply to juvenile delinquency proceedings. The standard contemplates that, as is usual in civil and criminal practice, the clerk will be required to issue signed and sealed, but otherwise "in blank," subpoenas to parties requesting them. As in the Federal Rules of Criminal Procedure, the party sending the subpoena should be able to make it returnable to some place other than the clerk's office, such as the office of the attorney. See Fed. R. Crim. P. 17(a). Unlike Fed. R. Crim. P. 17, the subsection does not require indigent respondents to make a special showing of "necessity" in order to subpoena a witness at public expense. All respon-

dents should have the same right to obtain subpoenas directly from the clerk, notwithstanding indigency. The state or county should absorb the costs of service and witness fees for those witnesses subpoenaed by an indigent respondent.

The second sentence of Standard 1.5 F. specifically protects the respondent's ability to subpoena public officials and public records. See commentary to Standard 3.3 A. 4. Since respondents generally have many contacts with public officials such as school administrators, welfare officials, probation officers, public health officials, court officers and others, their right to subpoena those officials and public documents relevant to the case should not be infringed. The standard does, of course, maintain the court's discretion to quash subpoenas of public officials or documents upon motion for good cause shown. This discretionary power protects the public official from abuse of the subpoena power.

#### 1.6 Multilingual notices.

Courts serving populations containing significant numbers of persons whose dominant language is not English should attempt to send petitions, summonses, and notifications of rights in English and in the dominant language of such persons. Such courts should take appropriate precautions to ensure that non-English-speaking recipients of court notices receive actual notice of the nature of the document sent.

#### *Commentary*

Oral and written notices of allegations or of rights that are incomprehensible to the recipient because of language barriers are clearly inadequate. Although statutes and court rules generally fail to provide for the special difficulties facing parties whose dominant language is not English, see commentary to Standard 2.3, some jurisdictions have taken formal cognizance of these problems. See, e.g., Rules of Practice of the Civil Court of the City of New York § 2900.2(e), (f), (g), requiring the summons in certain actions to be written both in English and in Spanish.

The development of standard multilingual notice forms for courts serving multilingual populations can reduce the administrative burden of complying with this standard. Also, brief "tag line" notices advising recipients that the document is a legal notice and should be translated, can be affixed in several languages to court notices in lieu of sending translated documents. This is especially useful in courts serving small or varied groups of non-English-speaking persons, or if

the official preparing the documents is uncertain what language form to use.

When the respondent and/or the parent appears personally for court proceedings, and it appears that the participant's native language is not English, the court should have an obligation to confirm that the participant is capable of fully understanding and participating in the courtroom proceedings. See Standard 2.3.

#### 1.7 Waiver of service of summons and petition.

A. The respondent in a delinquency proceeding should be permitted to waive service of the summons and petition as provided in Standards 6.1 through 6.4. If a respondent accompanied by counsel appears and knowingly submits to the proceedings without objecting to improper or defective service, such conduct should constitute waiver of those objections.

B. Parents of respondents and other adults should be permitted to waive their rights to service of the summons and petition as provided in Standard 6.10. A parent's voluntary and knowing appearance and submission to the court should constitute waiver of such rights.

#### *Commentary*

In civil proceedings, the component requirements of valid *in personam* see Unit. Supt. Citation 34:2:2(f), jurisdiction (valid service of the summons; proper notice as to the charges and the time and place of hearing) may be satisfied even though particular procedures mandated by statute or court rule have not been followed. A defendant is deemed to have waived the requirements of service of summons and other notice-giving documents by entering a "general appearance" in the case without objecting to the court's personal jurisdiction, James, *Civil Procedure* § 12.6, 626 (1965). A "general appearance" (and consequent waiver of objections to personal jurisdiction) may result from a defendant's knowing and intentional appearance in court, whether personally or by an agent, accompanied by written or parol action indicating submission to the court's jurisdiction in the case. 6 C.J.S. § 12. The defendant's general appearance also operates to waive any defects in the method, timing, or content of the notice received, unless, for some reason, the defendant "fails [in the course of appearing] to acquire full knowledge concerning the proceedings." 6 C.J.S. § 17.

In criminal cases the question of "waiver of process" does not usually arise because arrest can be used to bring the defendant forcibly before the court. Arrest can generally be used in lieu of sum-



mons, or after a summons has been issued without success. In contrast to the rule in civil procedure, appearance by defendant's counsel does not give the court jurisdiction. The defendant must appear personally before the court. 22 C.J.S. § 147. It has also been held that even if the defendant's presence before the court has been obtained by defective process or otherwise unlawful means, the court will nonetheless have valid jurisdiction over the person. *Lurie v. District Attorney of Kings County*, 56 Misc. 2d 68, 288 N.Y.S.2d 256, 266 (1968); *Ringer v. Municipal Court*, 175 Cal. App. 2d 786, 346 P.2d 881, 883 (1959).

The Supreme Court held in *Gault* that the Arizona delinquency proceedings unconstitutionally denied the juvenile and the parents adequate notice of the proceedings. In that case, neither Gault nor his parents were served with a summons or copy of the petition before the hearing on the merits; Arizona law did not require such service. In dismissing the state's claim that the appellants' failure to object to lack of notice at the time of the hearing constituted waiver, the Court stated: "Since the Gaults had no counsel and were not told of their right to counsel, we cannot consider their failure to object to the lack of constitutionally adequate notice as a waiver of their rights." *In re Gault*, 387 U.S. 1, 34, n. 54 (1967). The Court did not consider whether uncounseled juveniles and parents can expressly waive the right to timely and proper service of the summons and petition, nor whether a juvenile is capable of doing so even when represented by counsel.

These issues have arisen in a number of delinquency cases, but the courts have not treated them uniformly. The courts seem agreed that unless expressly or implicitly waived, proper service must be made upon both the youth *and* the parents or other figure *in loco parentis*. See commentary to Standard 1.5. Notice given only to the parents, *Maddox v. Bush*, 191 Miss. 748, 4 So. 2d 302 (1941); *State v. Casanova*, 494 S.W.2d 812 (Tex. 1973), or only to the juvenile, *Harris v. Souder*, 233 Ind. 287, 119 N.E.2d 8 (1954), will not give the court jurisdiction to hear the case. In some cases, the court views the defective service as a denial of the due process right to adequate notice, as in *Gault*, rather than as a jurisdictional defect. See *Commonwealth v. Roskov*, 307 A.2d 63 (Pa. Super. 1973). Some cases appear to hold that a failure of process or other notice to either the juvenile or the parent invalidates the juvenile court's jurisdiction, despite their presence and knowing participation in the proceedings, without objection. *In re McAllister*, 14 N.C. App. 614, 188 S.E.2d 723 (1972).

However, most courts seem to approach the issue assuming that notice rights are waivable, at least by parents and other adults, under

the normal civil doctrine that a party who is not served with process implicitly waives the right to notice by voluntarily appearing and participating in the proceedings. *State v. Casanova*, 494 S.W.2d 812 (1973); *Sharp v. State*, 127 So. 2d 865 (1961). This approach is widely accepted, although some courts seem reluctant to find that an unrepresented parent "voluntarily submitted" to the court's jurisdiction, particularly if the record does not show explicit findings to that effect, *Johnson v. State*, 136 Ind. App. 528, 202 N.E.2d 895 (1964).

There is less agreement among courts on whether faulty service of other notice to the juvenile can be cured by waiver, either express or implied. The Mississippi and Texas courts have taken the traditional view that "an infant can neither acknowledge nor waive the regular service of process upon him." *Sharp v. State*, 127 So. 2d 869 (1961). This approach is based on civil precedents which hold that an infant defendant is incapable of acting on his or her own behalf in litigation. *In re Stroman's Estate*, 178 Ore. 100, 165 P.2d 576 (1946); *Wright v. Jones*, 52 S.W.2d 247 (Tex. Com. App. 1932). Civil cases have also held that where an infant defendant is not served with process, the defendant cannot confer jurisdiction over the person by appearing in court. Nor is jurisdiction conferred in such cases by the appearance of the infant's father or attorney. *Herr v. Humphrey*, 277 Ky. 421, 126 S.W.2d 809 (1939) [father]; *In re Wretling*, 225 Minn. 554, 32 N.W.2d 161 (1948) [attorney].

However, the delinquency cases in which the courts have announced this general rule, have all been cases in which the juvenile was either unrepresented (and therefore "implied consent" to the court's jurisdiction would arguably be suspect), *Sharp v. State*, 127 So. 2d 865 (1961); 298 So. 2d 703 (Miss. 1974); *Monk v. State*, 238 Miss. 658, 116 So. 2d 810 (1960), or cases in which the respondent's counsel made timely objection to the lack of service (and therefore there was no implied waiver), *State v. Casanova*, 494 S.W.2d 812, (1973).

The Alaska Supreme Court has upheld delinquency findings despite the state's failure to serve the juvenile personally with the petition or summons, where the juvenile was present and participated through counsel in the proceedings without objection to the defect in notice. *R.L.R. v. State*, 487 P.2d 27 (Alaska, 1971); *Doe v. State*, 487 P.2d 47 (Alaska, 1971). The Alaska court pointed out that although personal service on the respondent is an important right, not satisfied by service on the parents, counsel's failure to object "may have been based on a strategic judgment that a dismissal would have led only to delay disadvantageous for his client." *R.L.R. v. State*, 487 P.2d 41 (Alaska, 1971). And, the court said in *R.L.R.*: "A child represented by competent counsel is about as fit as an adult to

waive this sort of objection, which is usually beyond the ken of adult laymen as well as children.” *Id.* at 41, n. 87. The court also argued that a “no waiver” rule could be used as a delaying tactic by an unprepared prosecutor when process was not correct. *Id.*

The Legislative Guide allows the parents, as well as other adult parties, to waive the right to service of summons, Legislative Guide § 15(e). The Uniform Act allows the juvenile’s counsel, with the consent of the parents, to waive service of summons on behalf of the juvenile. See Uniform Act § 22(e).

Standard 1.7 follows the Legislative Guide and the Alaska courts in permitting waiver of the counseled juvenile’s right to notice. Subsection A. cross-refers to the standards on waiver of the juvenile’s rights, which are complementary to this standard. Subsection B. deals with the rights of parents and other adults entitled to notice by reiterating the generally accepted rule that knowing and voluntary appearance and participation in the proceedings constitutes an implied waiver. However, it is envisioned that courts will be reluctant to find waiver in the absence of a record that shows a factual basis for finding express waiver, unless the adult had the benefit of counsel. The cross reference to the standards on waiver by adults will alert the court to the requirement of appropriate safeguards to ensure reliable waiver findings. Furthermore, to ensure actual notice of the allegations in the petition, adults who appear and knowingly waive the right to service should receive a copy of the petition at the proceeding.

## PART II: NOTIFICATION OF RIGHTS; INITIAL APPEARANCE

### 2.1 Notification of rights.

At every stage in the proceedings at which these standards require the giving of notice of rights, the following requirements should be satisfied:

A. notification of the juvenile’s rights should always be given to both the juvenile and the parent and/or guardian or custodian who is present at the proceedings;

B. the notice should be in writing but should be explained to the recipient by the judge personally in open court at the regularly scheduled hearing, in all circumstances where notice is given in the recipient’s presence;

C. notification should be given in simple language calculated to ensure the recipient’s understanding;

D. in bilingual and multilingual communities, notification should be given in English and in the dominant language of the recipient; and

E. the official record of the proceedings should record the fact that such notice was given and the contents of the notice.

*Commentary*

This standard is concerned with ensuring adequate notice to all persons entitled thereto. Adequate and timely notice is intrinsic in the idea of due process. As Justice Harlan noted in *Gault*:

The Court has consistently made plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the proceeding. Notice is ordinarily the prerequisite to effective assertion of any Constitutional or other rights; without it, vindication of those rights must be essentially fortuitous. *In re Gault*, 387 U.S. 1 at 73 (1967).

This standard sets forth requirements considered necessary to guarantee adequate notice, whenever notice is required by these standards. The premise of this standard is that notice without understanding is useless. A party can only assert rights if he or she understands their nature and the means of implementing them. Understanding can be facilitated by adequate notice.

The standard, therefore, requires that notice be given to the juvenile *and* any adult legally responsible for the juvenile who appears in court. This requirement is essential to the guarantee of due process, since often the juvenile will not be able to understand the nature of the rights or the charges without parental explanation. This requirement can also be implied from *Gault*'s requirement of formal notice to both parent and juvenile. *Id.* at 32-33.

The requirement that notice be in writing is also derived from *Gault*. *Gault* held that written notice must go to both parent and juvenile, informing them of the charges to be met at the adjudication hearing. *Id.* at 33. This standard goes further, however, and requires written notification of all rights.

In addition, the standard requires the judge to give an oral explanation of rights at every proceeding where rights are provided by these standards. Oral explanation allows the recipient to ask questions and enables the court to determine whether the rights are actually understood. This is particularly important in the juvenile court, because many juveniles may not have the capacity or maturity to understand written notice and, in some cases, may not be able to read.

The standard also requires that notice be given in simple language. The recipient's age and educational level must be considered when

notice is given, and rights must be explained in language that the recipient can understand.

The requirement that in bilingual or multilingual communities notice should be given both in English and in the recipient's dominant language is another technique intended to ensure full understanding by the recipient. See Standards 1.6 and 2.3.

Finally, the standard requires that a record be kept of the fact that notice was given and of its content. This will help enforce the adequacy of the notice and will give counsel a way to prove any inadequacy of notice, should it become relevant in later proceedings.

This standard is partially based upon the following legislation and rules requiring the juvenile court to notify the juvenile and the parents of their rights prior to the start of the adjudication hearing: Legislative Guide § 32; Model Rules, Rule 23; Standard Act § 19; Minn. Rules of Proc. for Juv. Cts., Rules 2-1, 2-2 (1970).

## 2.2 Initial appearance.

A. The initial appearance of a delinquency respondent before a judge of the juvenile court should not be later than [five] days after the petition has been filed.

B. At the first appearance in court the juvenile should be notified by the judge of the contents of the petition, and of his or her rights, including:

1. the right to counsel as provided in Standard 5.2;
2. the right to have parents present at all stages of the proceedings;
3. the right to a probable cause hearing;
4. the right to a trial by jury;
5. the right to confrontation and cross-examination of witnesses; and
6. the privilege against self-incrimination.

C. At the initial appearance, counsel should be appointed if necessary, and a date should be set for the fact-finding hearing.

### *Commentary*

This standard recommends a change in the existing law of most jurisdictions, by providing for an initial appearance for delinquency respondents similar to the arraignment in criminal cases. In criminal proceedings a defendant's first appearance in court is at the preliminary arraignment. The defendant is then notified of the charges and of the basic rights. At arraignment, the court will usually also set bail, appoint counsel if necessary, and fix the date for trial.

Juvenile court legislation generally does not provide for an arraign-

ment. Most statutes provide that certain preliminary procedures similar to those conducted at criminal arraignments must be followed at the juvenile's "initial appearance" in court, but do not specify when that must take place. See, *e.g.*, Ill. Ann. Stat. § 701-20 (Supp. 1974); Model Rules, Rule 23; Wyo. Stat. Ann. § 14-115.14 (Supp. 1973). Since the summons, under most juvenile court legislation, directs the parties to appear to answer the allegations of the petition, unless the respondent is initially taken into custody the "initial appearance" might not be until the day set for the fact-finding hearing itself. On that date the juvenile and the parents will be notified of their rights and of the allegations of the petition. If the right to counsel is then waived, the trial may be held, or an admission to a delinquency finding entered. If counsel appears or is appointed, counsel may request a continuance date for the fact-finding hearing.

The requirement in this standard that a delinquency respondent's initial appearance before the court should occur within five days of the time the petition is filed is consistent with the mandatory counsel requirement of these standards. See Standard 5.1. A prompt arraignment ensures that counsel will be retained or appointed for unrepresented respondents soon enough after the alleged delinquent acts have occurred to be able to assist effectively in preparing the defense. In many cases, the juvenile's initial appearance will take place earlier than this standard requires, because it will have occurred in conjunction with a detention hearing for a juvenile in custody. If there was a pre-petition intake conference, counsel will have entered the proceedings at that stage. See Standard 5.1 B. This standard, however, will ensure the timely entrance of counsel onto the scene in all other cases.

In the interests of fairness, the initial appearance should take place as promptly as possible. In urban courts, given the realities of calendar congestion and the time necessary for service of process, as many as five days might be required from the time the petition is filed. This should be regarded as the maximum tolerable delay. In most jurisdictions it should be possible to schedule the appearance for two or three days after filing.

In addition to the important events at the initial appearance described in Standard 2.2 B., the court might also wish to ascertain whether a transfer hearing will be held and, if so, to set a date therefor.

This standard is based upon D.C. Code § 16-2308 (Supp. 1972).

### **2.3 Multilingual communications.**

**In bilingual and multilingual communities, the court and counsel should take appropriate steps to ensure that language barriers do not**

deprive the respondent, parents, and other appropriate persons of the ability to understand and effectively participate in all stages of the proceedings. Such steps should include the provision of interpreters at all stages of the proceedings, at public expense.

### *Commentary*

Over twenty-two million people reported a native language other than English in the 1970 census and were either foreign born, or native born of foreign or mixed parentage. Of those, over 9.6 million reported Spanish as their first language, or lived in a family where the head reported Spanish as a first language. Comment, "Citado a Comparecer": Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?" 61 *Calif. L. Rev.* 1395 (1973), at 1399. Many of those whose native language is not English are juveniles who may have contact with the juvenile court. Over 90,000 pupils in New York City schools have insufficient English skills to graduate from high school. At least 1,750,000 school children in Texas, New Mexico, Arizona and California have Spanish surnames. Note, "El Derecho de Aviso: Due Process and Bilingual Notice," 83 *Yale L.J.* 385 (1973) at n. 9, 386.

This standard recognizes that inability to understand English may effectively deprive delinquency respondents, their parents, and other appropriate persons of the ability to participate in the proceedings. In multilingual or bilingual communities, where such language difficulties should be apparent to the court, the court and counsel should take affirmative steps to obviate language barriers. These steps might include the issuance of bilingual notices and the provision of interpreter services at all stages of the proceedings, at public expense.

Several factors should be considered by a court in determining whether to provide assistance to the non-English-speaking in their native languages. These factors are: the size of the non-English-speaking group and its proportion to the population served by the court; the extent of the group's rate of English illiteracy; and the extent to which the group is isolated from the surrounding English-speaking population. Consideration of these factors will allow the court to deal with the language problems of small, isolated, non-English-speaking populations such as the Chinese, Japanese, or Haitians, as well as those of large non-English-speaking populations such as the Spanish-speaking.

Although a group may be relatively small, its isolation from the surrounding English-speaking population and a low level of English literacy can combine to make the group almost self-sufficient in its

native language. On the other hand, wide distribution of a foreign language group throughout the area's population may also create a truly bilingual or multilingual community, calling for multilingual communication in the courts. The recent Federal Bilingual Courts Bill, U.S. Senate Bill S. 1724 (1974), provides for certification as bilingual districts of any judicial districts in which 5 percent or 50,000 residents, whichever is less, do not speak or understand English with reasonable facility. Rules on bilingual proceedings should apply in such certified districts.

Very few states have laws which accommodate the non-English-speaking.\* In some states, express "English only" requirements work against those who neither speak nor understand English. For example, ten states require, by statute, that only English be used in all court proceedings, Comment, 61 *Calif. L. Rev. supra* at n. 34, 1398, and an equal number of states require that only English be used in certain forms of official notice. Comment, *Calif. L. Rev. supra* at n. 35, 1398. Other states require that official records be written in English only. *Id.* at n. 36, 1398. Several cases have rejected arguments calling for translated notice and other services for non-English-speaking individuals receiving unemployment or welfare benefits. *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973), *Duerrero v. Carleson*, 109 Cal. Rptr. 201, 512 P.2d 833 (1973). However, two recent law review articles have presented compelling arguments for translated notice in civil proceedings, Comment, 61 *Calif. L. Rev.* (note) *supra*; 83 *Yale L.J. supra*. Several states have enacted bilingual court proceeding statutes, Cal. Evid. Code § 752 (West 1966); Revised Code of Washington ch. 2.42 (1973) (provisions for impaired persons), and the United States Senate has recently passed a bill which would provide for the appointment of interpreters in all federal, civil, and criminal proceedings. Senate Bill S. 1724 (1974).

In criminal trials, a non-English-speaking defendant may request

\*California makes provision for bilingual citizens in certain civil and administrative proceedings. For example, driver's license tests are given in Spanish, federal income tax instructions are available in Spanish, and the Social Security Administration prints information and forms in languages other than English. See Comment, "Citado a Comparecer: Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?" 61 *Calif. L. Rev.* 1395 (1973). New York City has provisions for multilingual notice in civil and criminal courts. See N.Y. City Crim. Ct. Act § 50 (McKinney's 1963); N.Y. City Civil Ct. Act § 401(d) (McKinney's Supp. 1972). New Mexico provides for bilingual newspaper notice if the population of an area is within 25-75 percent bilingual. If the population is over 75 percent Spanish-speaking, Spanish suffices, and if it is over 65 percent English-speaking, English suffices, *N.M. Stat. Ann.* § 10-2-11 (1953).



an interpreter. Many courts have held that failure to make a timely request for an interpreter constitutes waiver. In most of these cases, the matter is left to the discretion of the trial court and will rarely be overturned on appeal, despite recognition that a language barrier fundamentally impairs the defendant's ability to participate in the proceedings, and especially to waive rights knowingly. See *People v. Annett*, 251 Cal. App. 2d 858, 59 Cal. Rptr. 888 (1967), *cert. denied*, 390 U.S. 1029 (1968). However, a recent federal case, *U.S. ex. rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970), *aff'g*. 310 F. Supp. 1304 (E.D.N.Y. 1970), recognized the right of a non-English speaking defendant to an interpreter and rejected the notion of passive waiver by failure to make a timely assertion. Judge Kaufman, writing for the court, made clear that

the least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial. *Id.* at 390.

See also U.S. Senate Bill S. 1724 § 2(a), requiring express waiver and approval thereof by the judge and the attorney for the party.

Unless provision is made to overcome language barriers, the due process protections afforded by these standards to respondents, their parents, and other persons will be inadequate. The rationale sometimes offered for procedures in "English only" is that such a policy will motivate the non-English-speaking to learn English. This rationale is a hollow one, particularly in light of studies which have shown that acquisition of English by non-English-speaking groups is generally rapid, even if no external stimulus is applied. Leibowitz, "English Literacy: Legal Sanction for Discrimination," 45 *Notre Dame Lawyer* 7, 11 (1969). In fact, English-only procedures penalize those learning English who are still unable to communicate easily in the language.

Legal recognition of the special language needs of litigants may be constitutionally required under the due process clause. Several Supreme Court decisions have recognized the importance of tailoring notice to the recipient's special requirements, if feasible. The serving party's knowledge of the recipient's disability plays a pivotal role. See, *e.g.*, *Robinson v. Hanrahan*, 409 U.S. 38 (1972); *Schroeder v. City of New York*, 371 U.S. 208 (1962).

To determine the extent and nature of translation required to satisfy due process, one must weigh the harm to the non-English-speaking participant against the burden on the state to provide trans-

lation. One writer suggests that when the participants are known to be non-English-speaking, and the size of the language group and availability of translators make translation feasible, it hardly burdens the state to provide translation. Comment, *supra*, at 1395. Since the non-English-speaking individual stands to lose important constitutional rights through inability to understand the proceedings, the state should be required to present a countervailing interest of equal importance to overcome the need for translation.

In delinquency proceedings, those who do not speak English are at a severe disadvantage in several respects. Inadequate notice to the non-English-speaking is the easiest disadvantage to remedy. The Supreme Court has recognized that "a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). Insofar as it is feasible, when the recipient of a summons is suspected to be non-English-speaking (a fact which is often obvious from the surname and home address) the summons should be written both in English and in the recipient's native language. This requirement is simple to satisfy when a foreign language group is dominant in the community or is geographically concentrated. For example, of the 2.3 million Spanish households in the United States, 81 percent are located in nine states. Of the 9.6 million persons of Spanish origin, 60 percent live in three states. Note, 83 *Yale L.J. supra* at 394, n. 41.

For those foreign language groups that are small minorities in the community, but are nonetheless subject to contact with the juvenile court, the device of "tag line notice" can surmount some of the language barrier. Note, *supra*, at 396. "Tag line notice" consists of one sentence in each of the languages that are prevalent in the community. It reads "This is a legal notice, have it translated" and is affixed to an otherwise all-English notice. It requires little expense to add tag lines in the predominant foreign languages of the community to all notices sent out by the court. This step would satisfy the due process requirement of adequate notice.

Once the non-English-speaking participant receives adequate notice and appears in court for preadjudication and adjudication proceedings, many problems of translation arise. In communities where there are one or several predominant foreign languages, translation problems can be solved by having court interpreters present at all proceedings. For practical and administrative reasons, the state should bear the cost of providing these court interpreters. In many cases, those who require the assistance of interpreters will not be able to afford to pay them. The burden of paying to understand the

proceedings should not be placed on someone who does not speak the dominant language.

The problems of availability, competency, and objectivity of interpreters, and of the method of interpretation, should be readily solved by individual jurisdictions as their experience in multilingual proceedings grows. Those statutes presently providing for bilingual proceedings typically meet these problems by requiring the maintenance of lists of qualified interpreters, requiring the interpreter to take an oath prior to serving at any proceeding, and leaving to the judge's discretion the determination on whether simultaneous, consecutive, or summary translation is most appropriate in a particular proceeding. U.S. Senate Bill S. 1724; Calif. Evid. Code § 751 (1966).

Another critical question is the stage of the proceedings at which interpretation is necessary. In most cases, interpreters should be available at all stages of delinquency proceedings, including the juvenile's contact with the police and intake departments. When the juvenile comes into court for any hearing, however, the need for adequate understanding, and therefore translation, for the non-English-speaking is even more crucial. An English-speaking attorney cannot effectively perform defense functions for a non-English-speaking respondent, unless assisted by an interpreter. The non-English-speaking respondent requires the assistance of an interpreter at every adversary type hearing to understand the proceedings, to follow the testimony of English-speaking witnesses, to assist counsel in confrontation, to testify in his or her own behalf and to have non-English-speaking witnesses testify for the defense. Defender services and private counsel should therefore attempt to locate or provide interpreter services to facilitate communication with clients and other persons, such as parents and witnesses. Without such services, the rights guaranteed to the juvenile by *Gault*, and the insistence on representation by counsel under these standards, would be meaningless.

Although courts have been willing to recognize that fundamental fairness requires the appointment of an interpreter when the defendant speaks no English whatsoever, *U.S. ex. rel. Negron v. New York*, 434 F.2d 386 (2nd Cir. 1970); *State v. Vasquez*, 101 Utah 444, 121 P.2d 903 (1942), the problem may be more difficult to resolve when a respondent speaks a little English, but not enough to fully understand the procedures, and is not accompanied by a parent or other person who can translate for the respondent. In such cases, an interpreter should be provided. The fundamental fairness standard of the due process protection requires reversal of an adjudication of delinquency if it is found that the respondent was unable to participate

meaningfully at the hearing because of a substantial language disability, even if the respondent had some knowledge of English. *People v. Annett*, 251 Cal. App. 2d 858, 861, 59 Cal. Rptr. 888, 890 (1967).

The problems of the deaf must also be considered. Deaf respondents and deaf parents should be provided with a competent interpreter for the same reasons that non-English-speaking persons require competent interpretation in their native languages. Some courts have recognized that the deaf require such assistance to assure the full and fair exercise of their rights. See *People v. Guillory*, 178 Cal. App. 2d 854, 859; 3 Cal. Rptr. 415, 420 (1960); *Ralph v. State*, 124 Ga. 81, 52 S.E. 298, 300 (1905); Revised Code of Washington, ch. 2.42 (1973).

### PART III: DISCOVERY

#### Introductory

##### 3.1 Scope of discovery.

In order to provide adequate information for informed intake screening, diversion, and pleas in delinquency cases, and to expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial and other judicial hearings should be as full and free as possible consistent with protection of persons and effectuation of the goals of the juvenile justice system.

##### *Commentary*

Standard 3.1 calls for "full and free" discovery before trial in juvenile delinquency proceedings. This recommendation differs from the practice in most jurisdictions, where pretrial discovery rights are either unclear or strictly limited. Courts considering the issue have divided over whether delinquency respondents should have pretrial discovery rights as broad as those available in civil proceedings, only such rights as are available in criminal proceedings, or some unique combination of the two.

In civil proceedings there has been growing acceptance of the philosophy that "prior to every trial every party . . . is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged." Wright, *Law of the Federal Courts* § 81 (1970). Following the promulgation in 1938 of new rules of civil procedure, most states abandoned the old "sporting

theory of justice," *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958), with its emphasis on surprise as a trial tactic.

However, in criminal proceedings,

[d]espite the applicability to criminal cases of the reasons for a change in traditional adversary notions on the civil side, the resistance to the expansion of formal disclosure to the accused has been formidable. ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial* (Approved Draft, 1970) (hereafter ABA Standards, *Discovery*), commentary at 36.

Pretrial discovery in criminal cases has generally remained more restrictive than in civil cases in several respects. Although both parties in civil proceedings have access to discovery, in criminal cases, the existence of the privilege against self-incrimination has inhibited the development of discovery by the prosecution, and criminal discovery has tended to be unilateral for the defendant.

In civil proceedings, counsel for the parties may generally conduct discovery without resort to judicial intervention. However, in criminal proceedings, the defendant's discovery rights have tended to require resort to the judge's discretion in each instance. Finally, in civil proceedings, the available discovery devices typically include oral and written depositions, which, in criminal proceedings, may not be used for discovery purposes. Compare, *e.g.*, Fed. R. Civ. P. 30 (a) with Fed. R. Crim. P. 15.

### Criminal Discovery Reform

In recent years there has been a considerable change in attitude among courts, legislators, and practitioners concerning the use of discovery in criminal trials. Discussion has centered on two issues: 1. the items that should be discoverable by the defense prior to trial; and 2. in light of constitutional and policy concerns, whether the prosecution may discover the defendant's case and, if so, whether this right should be conditioned on the defendant's resort to discovery devices.

*Defense discovery.* As a general proposition, all the arguments favoring broad discovery provisions in civil cases are applicable to criminal trials. See ABA Standards, *Discovery*, commentary at 34-36. In addition, the imbalance of investigatory resources as between the state and the accused would seem to mandate liberal-

ized discovery rights for the defendant. As Moore notes, this imbalance is of prime concern to the indigent defendant who lacks a staff of paid investigators to obtain extrajudicial discovery. 8 Moore, "Federal Practice" § 16.02, 16-12 (1972); see also Pye, "The Defendant's Case for More Liberal Discovery," *Discovery Symposium*, 33 F.R.D. 47, 82 (1963).

The arguments against liberalized defense discovery in criminal trials are based on the fear that discovery will lead to perjury or to the intimidation or harming of witnesses. Thus, some have argued that not all defense counsel can be trusted not to use information regarding the state's case to construct a perjurious defense. The proponents of this view cite bilateral discovery as the tool that inhibits perjury in civil cases, note the uncertain constitutional status of prosecution discovery in criminal cases, and point to the higher stakes involved in criminal prosecutions. These arguments have been strenuously rebutted. In particular, proponents of liberalized discovery note the absence of empirical evidence supporting the perjury and harm to witnesses' fears, and emphasize that defense counsel, particularly assigned or appointed counsel, is unlikely to assist in the fabrication of defenses. See ABA Standards, *Discovery* at 36-40. The current trend toward expansion of prosecution discovery rights is a factor that also militates against the fabrication of defenses. And, devices such as the perpetuation of witnesses' testimony through pretrial depositions would minimize the risks of harm to witnesses.

The case for liberalized defense discovery has been greatly advanced by two recent developments. The first was the extensive revision in 1966 of Fed. R. Crim. P. 16, governing discovery in criminal trials, expanding the discovery rights of defendants. Further expansion will take place under the additional amendments to Rule 16, effective August 1, 1975, issued in 1970 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 44 F.R.D. 553, 587 (1970). The second development was the American Bar Association's approval in 1970 of the *Standards Relating to Discovery and Procedure Before Trial*. These ABA standards liberalize defense discovery even more than the new Federal Rule 16—e.g., by making discoverable several kinds of information not discoverable, or subject only to discretionary disclosure, under the federal rule. The clear preference expressed in the ABA standards is for discovery to proceed extrajudicially to the fullest extent possible.

*Prosecution discovery.* If the goal of a criminal trial is the ascertainment of truth and if that goal is best achieved when opposing

counsel have full knowledge of all facts prior to trial, then common sense would dictate that the prosecution be entitled to pretrial discovery of the defense case. Kane, "Criminal Discovery—The Circuitous Road to a Two-Way Street," 7 *U. San. Fran. L. Rev.* 203, 204 (1973). However, there may be constitutional and statutory roadblocks to prosecutorial discovery—e.g., the privilege against self-incrimination and the attorney-client privilege. Thus, although the trend has been toward allowing prosecutorial discovery, the constitutional validity of this device is uncertain.

Justice Traynor has argued that prosecutorial discovery does not violate the privilege against self-incrimination if disclosure is only required of material that the defendant intends to introduce at the trial, so that pretrial disclosure merely advances the time at which the defendant presents his or her case. Traynor, "Ground Lost and Found in Criminal Discovery," 39 *N.Y.U.L. Rev.* 228, 247-48 (1964). This view finds support in the recent case of *Williams v. Florida*, 399 U.S. 78 (1970), in which the United States Supreme Court found a Florida notice of alibi statute not to infringe upon the privilege against self-incrimination. The Court so held in spite of the fact that under the statute testimony from an undisclosed alibi witness could have been excluded. The Court treated the disclosure issue as one of timing.

In a subsequent case, *Wardius v. Oregon*, 412 U.S. 470 (1973), the Supreme Court limited *Williams* by holding invalid as a violation of due process a notice of alibi statute that was not complemented by any reciprocal defense discovery right as to the prosecution's case. Taken together, *Williams* and *Wardius* substantially uphold the validity of prosecution pretrial discovery rights as to at least some material which the defendant plans to introduce at trial. But the full impact of these cases is unclear regarding the permissible scope of discovery by the prosecution, and the nature and extent of the defense's reciprocal discovery rights required to justify prosecution discovery. See, e.g., *Hill v. Superior Court*, 518 P.2d 1353 (1974); *Wright v. Superior Court*, 517 P.2d 1261 (1974); *Commonwealth v. Contakos*, 314 A.2d 259 (1974); *Scott v. State*, 519 P.2d 774 (1974); *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973).

Before the August, 1975 change, the federal rules provided for "conditional" prosecution discovery—conditioned upon the defendant's choosing to exercise his or her rights to discover the state's case. The theory was that the defendant waives the fifth amendment privilege by opting for discovery. But if disclosure by the defendant is constitutionally protected by the fifth amendment, a problem arises whether discovery benefits may be conditioned on the aban-

donment of that protection. Justice Douglas, in commenting upon Fed. R. Crim. P. 16, has argued that they cannot. See 39 F.R.D. 272, 277-78 (1966). Since the 1966 revision of Rule 16, which codified the mechanism of conditional prosecutorial discovery, the competing notion of "reciprocal" discovery has gained adherents, and has been adopted by the ABA standards. Under reciprocal discovery, both the defense and the prosecution have the right to discovery, but the prosecution may exercise its rights even if the defendant does not choose to exercise his or hers, and vice versa. Reciprocal prosecution discovery is subject to the same constitutional doubts as conditional discovery, but it would not operate to discourage discovery by the accused. In opting for reciprocal rather than conditional discovery, the ABA has argued that if "disclosures to the accused promote finality, orderliness, and efficiency in prosecutions generally, these gains should not depend upon the possibly capricious willingness of the accused to make reciprocal disclosures." ABA Standards, *Discovery* at 45. Under the amendments to Rule 16, effective August 1, 1975, prosecution discovery rights are made reciprocal rather than conditional. Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts, Rule 16 (1974).

#### Juvenile Delinquency Proceedings: Background

As stated earlier, pretrial discovery rights in juvenile court proceedings are strictly limited in most jurisdictions. Where such rights exist, they are more often derived from judicial opinion than from statute or court rule.

Typically, the only statutory provisions that relate to discovery in juvenile proceedings concern either counsel's right to examine written reports submitted at the dispositional hearing or counsel's right of access to court or law enforcement records. Generally, social, medical, and psychological records are open to inspection by counsel, either as of right or at the court's discretion. See, e.g., Uniform Juvenile Court Act § 54; Cal. Welf. & Inst'n's Code § 827; D.C. Code Ency. § 16-2330; D.C. Court Rules—Juvenile Proceedings, Rule 16; Minn. Stat. Ann. § 260.161; Wyo. Stat. Ann. § 14-114.22, all of which grant counsel access as of right. Legislative Guide § 45, Standard Juvenile Court Act § 33, and Colo. Children's Code § 22-1-11, e.g., permit inspection by leave of court. Most statutes also allow counsel to inspect law enforcement records, often only at the court's discretion. See, e.g., Legislative Guide § 46; Uniform Juvenile Court Act § 55. Often the statutes fail to specify precisely when counsel's right to inspect attaches. It could therefore be assumed that



inspection could occur at the pretrial stage as well as later in the proceedings.

Any discussion of the case law on discovery rights in juvenile proceedings must begin with *Kent v. United States*, 383 U.S. 541 (1966). In *Kent* the Supreme Court struck down a transfer to criminal court, because the procedures used failed to meet statutory and constitutional requirements. One error was the denial to Kent's counsel of access to several social service files which were relied upon by the juvenile court in deciding to transfer the case. The Court characterized the juvenile's attorney's right of access to social records at the transfer proceeding as essentially statutory:

We believe that this result is required by the transfer statute read in the context of constitutional principles relating to due process and the assistance of counsel. *Id.* at 557.

The Court reasoned that, 1. based on earlier decisions in the District of Columbia, there was a right to counsel at every critical stage in the proceedings; 2. transfer was such a stage; 3. a rule of court gave a right of access to records to persons having a legitimate interest in the protection of the child; 4. counsel, by virtue of steps 1. and 2., had such an interest. Moreover, since counsel may wish to refute material in the records, effective assistance of counsel presupposes access to the records.

Because *Kent* essentially dealt with the right to confrontation (the decision to transfer was based upon "secret evidence"), the logic and holding of *Kent* cannot be mechanically applied to issues of pretrial discovery. Thus, courts deciding discovery issues often proceed without reference to *Kent*, seeking guidance from more general principles of due process and from the civil and criminal statutes. But see *Baldwin v. Lewis*, 300 F. Supp. 1220, 1232-33 (E.D. Wis. 1969).

In a series of cases the District of Columbia Court of Appeals has held that there is no "entitlement" or constitutional right to pretrial discovery in the juvenile court. See *In re Ketcham*, D.C. App. (Nos. 2704 and 2705 orig., decided June 26, 1964); *In re Ketcham*, D.C. App. (No. 2711 orig., decided June 26, 1964); *In re Ketcham*, D.C. App. (No. 2773 orig., decided July 29, 1964); cited in *District of Columbia v. Jackson*, 261 A.2d 511 (D.C.C.A. 1970). In *District of Columbia v. Jackson*, the court rejected an argument that the concept of fairness mandated the full panoply of criminal discovery rights in juvenile delinquency proceedings. The court also rejected the respondent's equal protection argument noting that sufficient differences—primarily in terms of attention to formalities—existed

between juvenile and criminal proceedings to justify different discovery rights. The court did hold, however, that *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, regarding the prosecutor's duty to disclose evidence favorable to an accused, were applicable to juvenile proceedings.

In Illinois delinquency hearings, juveniles currently have discovery rights greater than those allowed in criminal cases, but more restricted than those available in civil proceedings. As the Illinois Supreme Court, in *People ex rel Hanrahan v. Felt*, 48 Ill. 2d 171, 175, 269 N.E.2d 1 (1971), explained:

We can foresee situations in which the dangers inherent in a particular attempt at discovery might outweigh any benefit that could be received of discovery and we hold, therefore, that although a delinquency proceeding is civil in nature, it is sufficiently distinct from other civil actions to make inappropriate the automatic application of discovery provisions applicable to civil cases. *Id.* at 175.

In a series of New York cases, family courts have been divided on the issue of the juvenile's pretrial discovery rights in delinquency proceedings. Some cases have held that the full range of civil discovery devices are not appropriate to delinquency cases. In *In the Matter of Marie W.*, 62 Misc. 2d 585, 588 (1970), the court reasoned that granting bilateral pretrial discovery would violate the juvenile's right to remain silent, while granting unilateral discovery for the sole benefit of the juvenile would prejudice the petitioner.

In *In the Matter of Edwin R.*, 60 Misc. 2d 355 (1969), the court ruled that only some civil discovery rights were appropriate to delinquency cases. The court cited as determinative factors: 1. that petitioners were often civilians, unrepresented by counsel, and that discovery was only feasible when both sides were represented by counsel; and 2. that respondents were generally represented by overworked legal aid attorneys, and that granting full civil discovery rights—with the attendant requirements of preparation of motions, written interrogatories, etc.—would impose an even more unmanageable burden on counsel. However, the *Edwin R.* court did grant numerous discovery rights to the respondent, including the right to examine his own statements prior to trial in order to effectuate his right to suppress any involuntary confession, and the right to discover whether any of the respondent's property was unlawfully seized and, if so, whether petitioner planned to introduce property as evidence. The court further said that due process would be served by permitting discovery of autopsy reports and other scientific reports,

photographs and diagrams in advance of trial. Finally, the court held that the respondent could discover and copy written recorded statements of prospective witnesses for the petitioner, despite the fact that this evidence is not discoverable in criminal proceedings in New York, subject to the issuance of protective orders upon a proper showing (*e.g.*, of danger of harassment). *Id.* at 388. See also *In the Matter of Joseph P.*, 60 Misc. 2d 697 (1969); *Wolfe v. Berman*, 337 N.Y.S.2d 944, 40 App. Div. 2d 869 (1972); *In re Matter of Kenneth M.*, 60 Misc. 2d 699 (1969).

California has also granted broad pretrial discovery rights to delinquency respondents. See *Joe Z. v. Superior Court*, 3 Cal. 3d 797, 478 P.2d 26 (1970).

Standard 3.1, calling for "full and free" pretrial discovery in delinquency proceedings, is, like the rest of the standards in this part, based upon the ABA Standards, *Discovery*, Standard 1.2. The decision to model these standards upon the ABA standard rests on the belief that discovery needs in delinquency proceedings are similar to those in criminal proceedings. Presumably, therefore, the discovery rights available to both respondent and petitioner should be as great in delinquency as in criminal cases. In some respects, such as the availability of discovery by depositions, these standards recommend even more liberal discovery in delinquency cases than the ABA recommends for criminal cases (Standard 3.3 B.).

Pretrial discovery in delinquency, like civil and criminal proceedings assists the parties in narrowing the issues and in ascertaining the facts of the case. In delinquency, as in criminal cases, particularly when the juvenile is an indigent represented by appointed counsel, discovery offsets the imbalance of investigative resources between the government and the respondent. In turn, full pretrial knowledge of the facts and evidence in the case serves several vital procedural needs. In criminal cases, discovery may facilitate the conduct of an enlightened plea-bargaining process in which the defendant will be able to enter a fully informed plea and the necessity of holding a trial may be obviated.

Although not clearly denominated as such, "plea bargaining" also plays a role in delinquency proceedings. The juvenile may "admit" the allegations in return for the petitioner's promise to seek a particular dispositional alternative—*e.g.*, probation. Intake staff decisions to adjust a matter at the intake stage will generally require an "admission" as a prerequisite to such pre-judicial handling. Finally, in many jurisdictions, the entry of a consent decree requires that the respondent have admitted the allegations in order to earn the special treatment. Assuming the desirability of pretrial adjustment of juve-

nile cases in order to avoid trial, the need for developing an informed and equitable "plea-bargaining" process in juvenile cases is probably even greater than that in criminal cases.

The efficacy of the trial as a truth-seeking endeavor is enhanced by pretrial discovery. As the American Bar Association has noted:

Quick wits may be the mark of the trial lawyer, but they are not always sufficient for the orderly exposition and testing of evidence, which is the purpose of a trial. Where planning is foreclosed by lack of information, as has long been the custom in much of criminal litigation, surprise and gamesmanship usually govern the conduct of the proceedings. The result is too often a general obfuscation of the issues. ABA Standards, *Discovery* at 31.

Pretrial discovery may also serve to expedite trials. For example, pretrial discovery obviates the need for the court to grant continuances at trial, in order to mitigate the prejudicial effects of surprise. Continuances have the harmful effect not only of delaying the final outcome of the trial and of creating a dilemma for the juvenile who is in detention during the trial, but also of jeopardizing the accuracy of the fact-finding process by increasing the likelihood that witnesses will be unavailable for the hearing or that witnesses will be unable to recall the facts clearly.

Finally, pretrial motion practice is aided by discovery. Since the fourth and fifth amendments have been applied to delinquency proceedings, counsel will need to know, for example, whether property was seized from the respondent, or whether the respondent confessed and what circumstances surrounded the confession, in order to determine whether constitutional challenges to those events should be raised. In view of the unreliability and doubtful voluntariness of many juvenile confessions, see *In re Gault*, 387 U.S. 1, 45, 53 (1967), the need for access to such confessions and to information concerning interrogations may be more vital in delinquency than in criminal cases. See *Joe Z. v. Superior Court*, 3 Cal. 3d 797, 91 Cal. Rptr. 594, 478 P.2d 26 (1970).

The desirability of extending broad pretrial discovery rights to delinquency cases does not rest solely upon the similarity of procedural needs in criminal and delinquency cases. To the extent that particular discovery rights are mandated by the sixth amendment right to counsel, or fourteenth amendment due process, their application to delinquency proceedings may be necessary to meet constitutional requirements. See ABA Standards, *Discovery*, commentary at 56, 61.

Standard 3.1 is almost identical to Standard 1.2 of the ABA Standards, *Discovery*. See generally ABA Standards, *Discovery*, commentary at 34-46. The additional phrase "and other judicial hearings" in Standard 3.1 is intended to refer to pretrial hearings in delinquency cases such as transfer and detention hearings. When feasible, the advance conduct by counsel of "full and free discovery" as to appropriate matters should serve to expedite those hearings, and to enhance their fairness and accuracy.

### 3.2 Responsibilities of the trial court and of counsel.

A. The trial court should encourage effective and timely discovery, conducted voluntarily and informally between counsel, and should supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly, expeditiously, and with a minimum of imposition on the time and energies of the persons concerned.

B. Counsel for the petitioner and respondent should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of imposition on the time and energies of the persons concerned.

#### *Commentary*

Standard 3.2 describes the responsibilities of counsel and of the trial court in the pretrial discovery process. The standard stresses the obligation of counsel for both parties to conduct discovery between themselves, without unnecessarily involving the court. The court should establish a climate in which counsel are encouraged to do this "voluntarily and informally," so that judicial resources are conserved. "To the extent a judge becomes active in doing what counsel can and should do for themselves, he is permitting his time, energies and talents to be wasted." ABA Standards, *Discovery* at 49-50. On the other hand, the judge's intervention and supervision of discovery will often be necessary to insure that discovery proceeds expeditiously and without undue interference with the rights of parties, witnesses, and other persons.

The standard is based on Standard 1.4 of the ABA Standards. See *id.*, commentary at 49-51.

#### Disclosure to the Respondent

### 3.3 Petitioner's obligations.

A. Except as is otherwise provided as to matters not subject to

disclosure (Standard 3.8) and protective orders (Standard 3.17), the petitioner should disclose to respondent's counsel the following material and information within his or her possession or control:

1. the names and addresses of persons whom the petitioner intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;

2. any written or recorded statements and the substance of any oral statements made by the respondent, or made by a co-respondent if the trial is to be a joint one;

3. any reports or statements of experts, made in connection with the particular case, including scientific tests, experiments or comparisons, and results of physical or mental examinations, behavioral observations, and investigations of the respondent's school, social, or family background;

4. any reports or records, whether or not made in connection with the particular case, of the respondent's involvement with law enforcement, judicial, welfare, school, or other public agencies, which might assist counsel in representing the respondent before the court at any stage of the proceedings;

5. any books, papers, records, documents, photographs or tangible objects which the petitioner intends to use in the hearing or trial or which were obtained from or belong to the respondent;

6. any record of prior criminal convictions of persons whom the petitioner intends to call as witnesses at the hearing or trial; and

7. those portions of grand jury minutes containing testimony of the respondent and relevant testimony of persons whom the petitioner intends to call as witnesses at the hearing or trial.

B. Subject to Standards 3.8 and 3.17, the respondent should have the right to obtain discovery by way of deposition.

C. The petitioner should inform respondent's counsel:

1. whether there is any relevant recorded grand jury testimony which has not been transcribed; and

2. whether there has been any electronic surveillance (including wiretapping) of conversations to which the respondent was a party or of the respondent's premises.

D. Subject to Standard 3.17, the petitioner should disclose to respondent's counsel any material or information within his or her possession or control which tends to negate the allegations of the petition or would tend to mitigate the seriousness thereof.

E. The petitioner's obligations under this standard extend to material and information in the possession or control of members of the petitioner's staff and of any others who have participated in the

screening, investigation or evaluation of the case and who either regularly report, or who have reported with reference to the particular case, to the petitioner's office.

#### *Commentary*

Standard 3.3, which sets out the basic materials and information that the petitioner is obliged to disclose to the respondent's counsel, is drawn principally from the ABA standards. See ABA Standards, *Discovery* Standard 2.1, commentary at 1-2, 54-78. It should be emphasized that the petitioner should make these disclosures "as a matter of course and upon his own initiative," without forcing respondent's counsel to seek a court order. *Id.*, at 54.

The standards impose stricter limitations on pretrial investigation and testing of juveniles than of adults, as in *Police Handling of Juvenile Problems* Standard 3.2, which states: "For some investigative procedures, greater constitutional safeguards are needed because of the vulnerability of juveniles." This applies to witness identification, such as photographs, fingerprints, and samples of handwriting, voice, and blood. See also *Juvenile Records and Information Systems* Standard 19.6 and *Interim Status* Standard 4.5. However, the results of a lineup or other identification procedure should be discoverable by respondent's counsel to the extent they would be in criminal court proceedings. The following comments are mainly restricted to the differences between Standard 3.3 of this volume and Standard 2.1 of the ABA Standards, *Discovery*.

*Specific items.* Standard 3.3 A. 3. expands ABA Standard 2.1 (a)(iv) by specifying the petitioner's obligation to disclose to respondent's counsel "behavioral observations and investigations of the respondent's school, social, or family background." It is unlikely that social and similar reports will be introduced at fact-finding hearings in most delinquency cases. However, the reports mentioned in subsection 3.3 A. 3. may be made in connection with transfer, detention, or disposition hearings, and should be discoverable by respondent's counsel at the earliest feasible time. See *Kent v. United States*, 383 U.S. 541 (1966) (transfer hearing).

Subsection 3.3 A. 4. is not contained in the ABA standards. Its purpose is to give respondent's counsel access to reports or records concerning the youth's involvement with schools, the welfare system, and other public agencies. The subsection was deliberately drafted to maximize broadly counsel's access to information that might be of

some use in representing the juvenile, particularly at hearings on transfer, detention, and disposition. Standard 3.3 E. is intended to extend counsel's access rights to reports in the possession or control of intake screening staff and probation officers, and Standard 3.6 requires the petitioner to assist the juvenile's counsel, on request, to obtain such records from other governmental agencies. In most instances, however, counsel will prefer to subpoena these materials directly from the relevant agency under Standard 1.5 F., rather than seek the petitioner's assistance in obtaining them. In that way, counsel can preserve the confidentiality of the juvenile's records where appropriate.

Subsection 3.3 A. 7. concerns the petitioner's obligation to disclose certain grand jury minutes. It is based on ABA Standard 2.1(a) (iii). See generally ABA Standards, *Discovery*, commentary at 64-68. The subsection has been included here despite the lack of any grand jury procedure as part of delinquency proceedings, because there may be times when such disclosure will be essential to preparation of the respondent's case. This is particularly so if the delinquency allegations arise out of an incident in which adults were also engaged. In those cases the respondent may have testified before a grand jury inquiring into criminal prosecution of the adults, or the petitioner may plan to call other grand jury witnesses to testify in the delinquency proceedings. New York case law supports disclosure of grand jury minutes in delinquency cases. See *In the Matter of Juvenile Delinquents*, 303 N.Y.S.2d 406 (1969); *In the Matter of Kenneth M.*, 303 N.Y.S.2d 744 (1969); *Wolfe v. Berman*, 337 N.Y.S.2d 944 (1972).

*Depositions* (Standard 3.3 B.). Although in civil proceedings in many jurisdictions the parties may freely take depositions for the purpose of pretrial discovery, that has not been true in criminal proceedings. The ABA standards seriously considered whether criminal defendants should have a right to discovery by deposition but, by a majority of the advisory committee, decided instead to permit the court, in its discretion, to authorize depositions "upon a showing of materiality to the preparation of the defense, and if the request is reasonable." ABA Standards, *Discovery*, Standard 2.5(a) and commentary at 86-88. Standard 3.3 B. adopts the ABA's minority view to apply in delinquency proceedings. See also "Proposed Uniform Rules of Criminal Procedure," Rules 25-26 (Second Tent. Draft, 1973).

The ABA commentary advances four reasons for not granting a right to take depositions. First, that "[t]here is no inherent limitation of cost on the conduct of unnecessary depositions, because in many



cases the cost of the defense must be borne by the state." ABA Standards, *Discovery*, commentary at 87. Although this argument has surface validity, it does not seem sufficiently weighty to decide the issue, in light of the advantages of a civil type deposition procedure. The unsupported fear of abuse by indigents, while not lightly disregarded, appears to be an insufficient basis for the rejection of a procedure that otherwise serves the interests of the parties and of judicial economy. The standards in this volume do provide a remedy for "unnecessary" resort to depositions, in the form of an application to the court for a protective order (Standard 3.17). Also, in view of the expense to the state involved in a protracted trial, any procedure that minimizes the length and confusion of trial, or that obviates the need to hold a trial, would save the state money.

Second, the ABA argues that if stated as a right, the need to take depositions might be viewed as part of the adequacy of representation required as part of the constitutional right to counsel. ABA Standards, *Discovery*, commentary at 87. At the heart of this argument is the fear that every time defense counsel fails to use deposition procedures, a litigable question will arise as to the adequacy of representation at trial. This objection seems insubstantial in that an issue of adequacy of counsel could arise under ABA Standard 2.5(a) as it reads currently—*i.e.*, anytime defense counsel failed to try to obtain court permission to use the deposition process the adequacy of representation might be in question. Also, given the difficulties which defendants currently face in trying to persuade an appellate court that they received inadequate representation, this argument seems highly speculative.

Third, the ABA argues that the imposition upon civilian witnesses caused by the taking of depositions would discourage their coming forward. ABA Standards, *Discovery*, commentary at 87. But, under Standard 3.17 the petitioner could seek a protective order in any case in which it was felt that depositions were being taken merely to harass a witness. If defense counsel already had available copies of statements made by a witness, and could not show good cause for the demand, it is likely that the court would grant a protective order.

Finally, the ABA argues that depositions do not really add much to the other disclosures mandated by the standards. This argument will not always hold true. For example, a person whom the petitioner may wish to call as a witness at trial may not, in some cases, have made a statement to the prosecuting authorities concerning knowledge of the case. Therefore, if the respondent desires to know the substance of the prospective witness' knowledge or prospective testimony in advance of the hearing, the taking of a deposition will

be the only source of such information. Similarly, even when a prospective witness has given a statement to the petitioner and that statement has been turned over to the respondent, there may be matters of which the respondent seeks knowledge which are not included within that statement and to which the juvenile may have access only by the taking of a deposition.

In sum, the arguments against granting the respondent a right to proceed by deposition seem insubstantial when weighed against the value of giving juvenile respondents the broadest range of discovery rights consistent with the orderly conduct of proceedings and the fundamental rights of other parties. See Proposed Uniform Rules of Criminal Procedure, Rule 25, commentary at 118-20. The availability of protective orders under Standard 3.17 should suffice to prevent abuse of the deposition power.

#### 3.4 Petitioner's performance of obligations.

A. The petitioner should perform the obligations set forth in Standard 3.3 as soon as practicable following the filing of a petition in respect of the respondent.

B. The petitioner may perform these obligations in any manner mutually agreeable to petitioner and counsel for the respondent, or by:

1. notifying counsel for the respondent that material and information described in general terms may be inspected, obtained, tested, copied, or photographed during specified, reasonable times; and
2. making available to respondent's counsel, at the time specified, such material and information and providing suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

C. The petitioner should ensure that a flow of information is maintained between the various investigative personnel and petitioner's office sufficient to place within his or her possession or control all material and information relevant to the respondent and the allegations of the petition.

#### *Commentary*

Because these standards do not condition the petitioner's obligation to disclose information on the request of opposing counsel, Standard 3.4 is necessary to elaborate the nature of the petitioner's responsibility. This standard is drawn verbatim from the ABA Standards, *Discovery* Standard 2.2, commentary at 79-81.

### 3.5 Additional disclosures upon request and specification.

Subject to Standards 3.8 and 3.17, the petitioner should, upon request of the respondent, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

- A. specified searches and seizures;
  - B. the acquisition of specified statements from the respondent;
- and,
- C. the relationship, if any, of specified persons to the petitioning authority.

#### *Commentary*

This standard deals with the petitioner's obligation to disclose, upon request of the respondent, certain materials that might not be included in the basic scope of the requirements of Standard 3.3. Standard 3.5 parallels the language of the ABA standards. See ABA Standards, *Discovery* Standard 2.3, commentary at 82-83.

### 3.6 Material held by other governmental personnel.

Upon the request of respondent's counsel and designation of material or information that would be discoverable if in the possession or control of the petitioner, and that is in the possession or control of other governmental personnel, the petitioner should use diligent good faith efforts to cause such material to be made available to respondent's counsel; if the petitioner's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to respondent's counsel.

#### *Commentary*

This standard obliges the petitioner, once the respondent's counsel has requested specific, discoverable material that is in the possession or control of other government personnel, to use "diligent good faith efforts" to have the material made available to counsel, and provides for court intervention if the petitioner's efforts are not fruitful. As discussed in the commentary to subsection 3.3 A. 4., in delinquency cases the "other governmental personnel" might include such agencies as the local school or welfare agency. In order to safeguard the confidentiality of such materials, respondent's counsel may prefer to subpoena the desired materials from the agency directly, under Stan-

ard 1.5 F., instead of enlisting the petitioner's aid. In such cases, the court should not insist that respondent's counsel first attempt to obtain the material through the petitioner's office.

This standard reflects the language of ABA Standards, *Discovery* Standard 2.4, commentary at 83-84.

### 3.7 Discretionary disclosures.

A. Upon a showing of materiality to the preparation of the respondent's case and if the request is reasonable, the court, in its discretion, may require disclosure to respondent's counsel of relevant material and information not covered by Standards 3.3, 3.5, and 3.6.

B. The court may deny disclosure authorized by this standard if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to respondent's counsel.

#### *Commentary*

This standard conditions the discovery of materials not covered by the previous standards on a showing in court of materiality and reasonableness. The court has broad discretion to deny the request. This standard covers disclosure of residual matters and items in the possession of private parties—*e.g.*, a private child welfare agency or a co-respondent. The standard is drawn from the ABA standards. See ABA Standards, *Discovery* Standard 2.5, commentary at 85-88.

### 3.8 Matters not subject to disclosure.

A. Disclosure should not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the petitioner's attorney or members of petitioner's legal staff.

B. Disclosure of an informant's identity should not be required where the identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the respondent. Disclosure should not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

#### *Commentary*

This standard expresses the accepted work product and informant identity limitations on pretrial discovery. Subsection (c) of ABA Standard 2.6, upon which this standard is based, has been omitted

because of the extreme unlikelihood of delinquency cases arising that impinge upon national security. In such an event, protection could be afforded under Standard 3.17, *infra*. See generally ABA Standards, *Discovery* Standard 2.6, commentary at 88-93.

### 3.9 Discovery at intake screening stage.

Upon the request of counsel for a juvenile who has been referred for intake screening on a delinquency report, the intake unit should give the juvenile's counsel access to all documents, reports, and records within its possession or control that concern the juvenile or the alleged offense.

#### *Commentary*

This standard is meant to implement the policy underlying Standard 5.1, that the juvenile's counsel may have a role to play at the intake stage. In order to perform effectively, counsel should have access to the information on which intake decisions may be based, so that counsel may try to: A. discover and correct inaccuracies; B. suggest alternate courses of action to the filing of a petition; C. obtain information helpful in preparing a defense to the petition; and D. begin disposition planning early in the proceedings.

This standard has no analogue in the ABA Standards, *Discovery*.

#### Disclosure to the Petitioner

### 3.10 Medical and scientific reports.

Subject to constitutional limitations, the trial court may require that the petitioner be informed of and permitted to inspect and copy or photograph any reports or statements of experts made in connection with and intended to be introduced in evidence in the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

#### *Commentary*

Standard 3.10 gives the trial court discretion to order respondent's counsel to disclose certain reports of tests and examinations made in connection with the case. Included within the standard might be, for example, reports of a defense-initiated psychiatric examination of the youth. Although there is an express requirement that only reports that the respondent intends to introduce at trial are subject to court-ordered discovery, this may be the effect of the standard's initial

phrase, "subject to constitutional limitation." See ABA Standards, *Discovery* Standard 3.2 as amended, commentary at 44-45, 97-98, and Supp. at 2-3. As discussed earlier, the constitutional restrictions upon discovery from the respondent will make the court cautious in applying this standard and Standard 3.11. See commentary to Standard 3.1.

The standard departs from Standard 3.2 of the ABA standards in language if not in effect, by expressly limiting discovery to reports intended to be offered in evidence. See generally ABA Standards, *Discovery*, commentary at 97-98 and Supp. at 2-3.

### 3.11 Nature of defense.

Subject to constitutional limitations, the trial court may require that the petitioner be informed of the nature of any defense which respondent's counsel intends to use at trial and the names and addresses of persons whom respondent's counsel intends to call as witnesses in support thereof.

#### *Commentary*

This standard further implements the general policy that discovery should be a "two-way street" by permitting the trial court to require respondent's counsel to give the petitioner advance notice of the nature of the planned defense and of the identity of the witnesses who will testify in support thereof. The introductory phrase, "subject to constitutional limitations," signals the fact that the permissible scope of prosecutorial discovery is unsettled, and that the court's discretion to order discovery under this standard must be used with great caution. See commentary to Standard 3.1. In commenting upon ABA Standard 3.3, upon which this standard is based, the ABA Advisory Committee on Pretrial Standards stressed the hazards attending the administration of such a standard. It pointed out that defense counsel frequently does not decide upon a precise defense before hearing the prosecution case at trial. Because of this, the advisory committee emphasized the difficulty of enforcing sanctions against counsel for failing to comply with such orders. ABA Standards, *Discovery* Standard 3.3., Supp. at 5-6. These cautions are equally applicable to the preparation and trial of delinquency cases.

### 3.12 Depositions.

Subject to Standards 3.8 and 3.17, the petitioner should have the right to obtain discovery by way of deposition, except that the petitioner should not have the right to depose the respondent without the respondent's consent.

*Commentary*

This standard permits the petitioner, like the respondent, to use depositions as a means of discovering the defense case prior to trial. It is included as a corollary of Standard 3.11, which may result in disclosure of the names and addresses of persons intended as trial witnesses for the respondent. Having learned the identity of these witnesses, the petitioner may take their depositions for the purpose of discovery. Compare Standard 3.3 B., giving the respondent a similar right. But, because of the respondent's privilege against self-incrimination, *In re Gault*, 387 U.S. 1 (1967), the standard precludes taking the respondent's deposition without consent. The respondent could only validly consent if he or she were mature and advised by counsel. See Standard 6.1 and commentary thereto.

This standard represents a departure from the ABA Standards, *Discovery*, in favor of the view adopted by the Proposed Uniform Rules of Criminal Procedure, Rules 25-26 (Second Tent. Draft 1973).

**Regulation of Discovery****3.13 Investigations not to be impeded.**

Subject to Standards 3.8 and 3.17, neither the counsel for the parties nor others officially involved in the case should advise persons having relevant material or information (except the respondent) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

*Commentary*

This standard obliges counsel and other personnel connected with the case to refrain from impeding pretrial investigations and discovery. It is based upon the ABA Standards. See ABA Standards, *Discovery* Standard 4.1, commentary at 98-99.

**3.14 Deposition procedures.**

Depositions in delinquency proceedings should be governed by the rules governing depositions in criminal proceedings in jurisdictions which have such rules. In other jurisdictions, special rules to govern depositions in delinquency proceedings should be adopted.

*Commentary*

This standard concerns deposition procedures. In those few jurisdictions that use depositions in criminal proceedings, the standard recommends that the same procedures be applied in delinquency proceedings. In other jurisdictions, instead of applying the rules governing depositions in civil cases—which would not be suitable—special procedural rules should be adopted. The “Proposed Uniform Rules of Criminal Procedure,” Rules 25 and 26 (Second Tent. Draft 1973), could serve as a model for such rules. They govern the taking of depositions by defendant and prosecutor and cover areas such as when and how depositions may be taken, notice of taking, payment of expenses, and use of depositions.

The ABA Standards, *Discovery*, contain no analogous standard.

**3.15 Continuing duty to disclose.**

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, such party should promptly notify the other party or opposing counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court should also be notified.

*Commentary*

This standard provides that discovery obligations continue after initial disclosures are made and imposes an obligation to make supplementary disclosures, even during the trial, if additional materials subject to disclosure are discovered. See ABA Standards, *Discovery* Standard 4.2, commentary at 98-100, which is the source of this standard.

**3.16 Custody of materials.**

Any materials furnished to an attorney pursuant to these standards should remain in the exclusive custody of such attorney and be used only for the purposes of conducting the case, and should be subject to such other terms and conditions as the court may provide. In the discretion of counsel for the respondent, the contents of furnished material may be disclosed to the respondent and, subject to a mature juvenile’s consent under Standard 6.5 A. 2., to the respondent’s parent or guardian *ad litem*. Counsel should exercise utmost caution before doing so if disclosure might cause injury or embarrass-



ment to the respondent or any other person and if disclosure is not necessary to protect the respondent's interests in the proceedings.

### *Commentary*

This standard is intended to stress the duty of counsel, either for the respondent or the petitioner, to deal responsibly with materials disclosed under these standards. Counsel should not furnish copies to anyone, or allow the materials to leave counsel's office. The second and third sentences of the standard address the special problems counsel for a delinquency respondent may face. The standard states that counsel should refrain from disclosing material that might cause injury or embarrassment to the respondent or another person unless disclosure is necessary to protect the juvenile's interest in the proceedings. The decision whether to disclose material, such as the contents of a school or welfare department report, may be very difficult. Such reports might contain sensitive information not known to the juvenile, such as the fact that the juvenile is adopted, or that a parent has a history of prostitution or neglect. In cases where the lawyer is unsure about the emotional harm that could result to a juvenile or parent from disclosure, counsel should consult, if possible, with a trained professional, such as a psychologist or social worker.

Special problems may arise concerning disclosure to the juvenile's parent or guardian *ad litem* of sensitive material concerning the respondent, which the juvenile may wish to keep confidential. If the juvenile is mature, he or she should be permitted to make that decision, subject to the parent's challenge under subsection 6.5 A. 2. If the juvenile is immature, then counsel may decide over the juvenile's objection that disclosure is necessary in order to enable the guardian *ad litem* to instruct counsel intelligently in the proceedings. See commentary to subsection 6.5 A. 2.

The first sentence of the standard is derived from the ABA standards. See ABA Standards, *Discovery* Standard 4.3, commentary at 100-01. The rest of the standard is original.

### **3.17 Protective orders.**

Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled under these standards must be disclosed in time to permit counsel to make beneficial use thereof.

*Commentary*

This standard is critically important. It permits the court, upon a showing of cause, to restrict or defer disclosure authorized under the other standards of this part. The ABA commentary indicates the function served by protective orders:

In order that legitimate needs of exceptional cases will not shape discovery policy to the extent that it will result in denial in all cases . . . some instrument is necessary to provide sufficient flexibility to meet such needs. . . . Some restriction or deferral of discovery may be necessary where there is a reasonable likelihood of intimidation of witnesses . . . or of harm to witnesses . . . or of thwarting an on-going investigation. ABA Standards, *Discovery* Standard 3.17, commentary at 101.

Since the possibilities of harm or intimidation of witnesses or the impeding of an investigation are present in delinquency proceedings—although the problems may be less severe than in criminal cases—and since the need for pretrial disclosure is as strong in delinquency as in criminal cases, this standard is essential. It is taken verbatim from Standard 3.17 of the ABA standards on discovery. See generally ABA Standards, *Discovery*, commentary at 101-02.

**3.18 Excision.**

When some parts of certain material are discoverable under these standards, and other parts not discoverable, as much of the material should be disclosed as is consistent with the standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole. Materials excised pursuant to judicial order should be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

*Commentary*

As in Standard 3.17, this standard provides a device for enhancing discovery generally by restricting it in particular situations—in this case, if only some parts of certain materials are discoverable. The standard permits the compromise of partial disclosure, and requires the court to preserve a sealed record of the excised material for purposes of appellate review.

The standard is derived from ABA Standard 4.5. See ABA Standards, *Discovery*, commentary at 103-04. In view of the sensitive

nature of many discoverable items that may be sought in delinquency proceedings, it is appropriate to include this provision in the standards.

### 3.19 *In camera* proceedings.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures or portion of such showing, to be made *in camera*. A record should be made of such proceedings. If the court enters an order granting relief following a showing *in camera*, the entire record of such showing should be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal. A judicial officer who is exposed in an *ex parte* proceeding under this standard to material which might be prejudicial to the absent party should be excused from further involvement in the case.

#### *Commentary*

This standard provides an *ex parte* procedure for the court to hear arguments that disclosure in a particular instance should be denied or restricted. The hearing is closed in order to permit the moving party to discuss the material that is the subject of attempted discovery without defeating the purpose of the motion. As in Standard 3.18, a sealed record is kept for review purposes.

Except for the last sentence, which is original, this standard is derived from ABA Standard 4.6. See generally ABA Standards, *Discovery*, commentary at 104-06. The last sentence has been added as a safeguard against unnecessary judicial "contamination" from these *ex parte* proceedings. In courts having only one judge who sits in delinquency cases, it will not be possible to comply with this part of the standard.

### 3.20 Sanctions.

A. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

B. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

*Commentary*

This standard adopts Standard 4.7 of the ABA Standards, *Discovery*. Although this standard gives the court broad discretion to fashion a suitable remedy for failure to comply with discovery rules or orders under this Part, the ABA commentary indicates that the sanction of prohibiting the nondisclosing party from introducing into evidence the material not disclosed is disfavored as impeding the fair and speedy determination of cases. Instead, courts should consider treating attorneys' violations of discovery obligations in the same way as infractions of bar discipline or as contempt. (But see Standard 3.11 and commentary thereto on the hazards of applying sanctions to respondent's counsel.)

See generally, ABA Standards, *Discovery*, commentary at 106-08.

## PART IV: THE RIGHT TO A PROBABLE CAUSE HEARING

## 4.1 The right to a probable cause hearing.

A. In all delinquency proceedings the respondent should have the right to a judicial determination of probable cause, unless the adjudicatory hearings is held within [five] days after the filing of the petition if the juvenile is detained, and within [fifteen] days if the juvenile is not detained. Unless it appears from the evidence that there is probable cause to believe that an offense has been committed and that the respondent committed it, the petition should be dismissed.

B. Unless there has been a prior judicial determination of probable cause, detention and transfer hearings should commence with consideration of that issue.

*Commentary*

Delinquency respondents in some jurisdictions have the right to a pretrial judicial determination of probable cause, in certain limited circumstances. This standard recommends expansion of the right to extend to all juveniles, whether or not in detention, who do not receive prompt adjudicatory hearings.

Other volumes include similar standards. *Prosecution* Standard 4.6 requires a judicial determination of probable cause at the juvenile's first appearance in family court, whether a detention, transfer, or other preliminary hearing. See also *Interim Status* Standard 7.6 F. and *Transfer Between Courts* Standard 2.2 A. 1. *Prosecution Stan-*

standard 6.1 requires speedy adjudication, with detention cases given priority, although time limitations are not specified as they are in this standard.

#### Background: Criminal Proceedings

In both civil and criminal proceedings there are a variety of devices designed to prevent unmeritorious cases from reaching trial. In criminal cases, indictment by a grand jury determines that there is "probable cause" to believe that the accused committed the crime charged, and justifies putting the defendant to trial.

One jurist, analogizing the function of the preliminary hearing to that of the grand jury, has stated that it serves:

... to prevent hasty malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based. J. Rosenberry, *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922).

The preliminary hearing serves several functions other than screening. At the hearing, defense counsel will be able to discover the government's case from the prosecutor's presentation of the state's case-in-chief and the defense's cross-examination of the state's witnesses. See, e.g., *Coleman v. Alabama*, 399 U.S. 1 (1970). Such cross-examination may also provide the defense with a vital impeachment tool. In some jurisdictions the preliminary hearing serves as a substitute for full trial; for example, in Los Angeles County the transcript of the preliminary hearing is often submitted at trial by stipulation and serves to present the state's case. Graham and Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations," 18 *U.C.L.A. L. Rev.* 916, 931 (1970-71). The hearing may also provide a forum for the adjudication of certain evidentiary questions—e.g., the admissibility of a confession—or for plea bargaining, and may serve as the foundation for the entry of a guilty plea and sentencing. Graham and Letwin, *supra*, at 639-41.

Until very recently, it was unclear whether a criminal defendant had a constitutional right to a preliminary hearing in cases where no grand jury indictment is found. The weight of opinion was that even where statutory provisions required a preliminary hearing, the need

for the hearing was mooted by the intervening filing of an information. Such rulings were found constitutionally acceptable. *Lem Woon v. Oregon*, 229 U.S. 586 (1913); *State v. Ollison*, 68 Wash. 2d 65, 411 P.2d 419, cert. denied 385 U.S. 874 (1966); *Rivera v. Gov't of Virgin Islands*, 375 F.2d 988 (3d Cir. 1967); *United States v. Funk*, 412 F.2d 452 (8th Cir. 1969). But several other cases found a constitutionally-based right to a preliminary hearing. *Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969); *Brown v. Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971); *Pugh v. Rainwater*, 332 F. Supp. 1107 (S.D. Fla. 1971). *Pugh*, for example, held that due process and the fourth amendment require a preliminary hearing where the defendant is incarcerated and an information is filed without a prior judicial determination of probable cause. An individual's right to be free from unreasonable seizures and from deprivation of liberty without due process were said to depend on judicial safeguards against the arbitrary power of police and prosecutors. The court concluded that a preliminary hearing was necessary to satisfy these constitutional mandates stating:

A criminal system wherein the individual faces prolonged imprisonment upon the sole authority of the police and/or prosecutor violates the principles which underlie this country's founding and which are the essence of the constitutional guarantees of freedom from unreasonable seizure and from deprivation of liberty without due process of law . . . the court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause. *Pugh v. Rainwater*, 332 F. Supp. 1107, 1112 (S.D. Fla. 1971).

The constitutional status of the right to a preliminary hearing was recently settled by the United States Supreme Court. In *Gerstein v. Pugh*, 420 U.S. 103 (1975) the Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest." *Id.*, at 114. Reaffirming the principles stated in *Johnson v. United States*, 333 U.S. 10, 13-14 (1968), the Court noted that significant restraints on liberty were justifiable only where a neutral, detached, and hence, judicial review of probable cause could be had. Review by a prosecutor, as in *Gerstein* where an information was filed, or by arresting officer was deemed constitutionally insufficient.

The facts before the Court in *Gerstein* involved detained defendants. The Court in dicta indicated that the fourth amendment would not mandate a judicial probable cause hearing where no re-

straint was involved. But it made clear that pretrial release might "be accompanied by burdensome conditions that effect a significant restraint on liberty," and therefore entitle the defendant to a preliminary hearing. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

### Juvenile Delinquency Proceedings

In juvenile delinquency proceedings the question of probable cause arises in two distinct situations: when a juvenile is detained pending the adjudicatory proceeding, either because the case was commenced by an arrest or because the juvenile was taken into custody pursuant to a court-issued summons; and when a juvenile is not taken into custody, or is released shortly after being taken into custody.

*Detained juveniles.* When a juvenile is in detention or shelter care at the time of, or subsequent to, the filing of a petition, most jurisdictions provide for a judicial hearing to review the need for such custody. Most of the statutes contain criteria by which the judge is to determine if such custody should be continued pending the hearing. The criteria typically include whether detention or shelter care is necessary to protect the juvenile from others, to insure the juvenile's presence at subsequent proceedings, or to prevent the juvenile from harming him- or herself or others. See the *Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition* volume. See also Alaska Rules of Juvenile Proc., Rule 7 (1966); Cal. Welf. and Inst'ns Code § 635 (1972); Uniform Juvenile Court Act § 14, Legislative Guide § 20.

The majority of juvenile court acts and court rules do not require a probable cause inquiry at the detention hearing. The recently enacted District of Columbia provisions, D.C. Code Ency. § 16-2312 (1970), are an exception. There, the detention/shelter care hearing is in two stages. At the first stage the court determines the necessity of continued custody. If the court finds detention is required, the prosecutor then must present evidence demonstrating that there is probable cause to believe the allegations of the petition are true. The juvenile and parents may present evidence on the issue. If probable cause is found, the court may continue the detention or shelter care. If the judge finds no probable cause, he or she must order the youth's release. See also Ill. Ann. Stat. ch. 37, § 703-6 (Smith-Hurd 1966); N.Y. Family Ct. Act § 728 (1962).

Several recent cases have held that the juvenile has a constitutional right to a probable cause hearing prior to continued detention.

*Cooley v. Stone*, 414 F.2d 1213 (D.C. Cir. 1969); *In re Edwin R.*, 60 Misc. 2d 355, 303 N.Y.S.2d 406 (Fam. Ct. 1969); *Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wis. 1969), rev'd on other grds. 442 F.2d 29 (7th Cir. 1971); *In re Macidon*, 240 Cal. App. 2d 600, 49 Cal. Rptr. 861 (Dist. Ct. App. 1966); *In re Contreras*, 109 Cal. App. 2d 787, 241 P.2d 631 (Dist. Ct. App. 1952); see also Jones, "Pre-Hearing Detention of Youthful Offenders: No Place to Go," 1 *Yale Rev. L & Soc. Action* 28, 39 (Spring 1971); Note, 4 *Rutgers-Camden L.J.* 171 (Fall 1972).

In *Cooley v. Stone*, the court ruled:

No person can lawfully be held in penal custody by the State without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. Such is the teaching of *Gault* and the teaching of *Kent*. . . . Certainly by the stage of the initial hearing, a probable cause hearing when requested is required under the Constitution to support the continued penal custody of a juvenile in this jurisdiction. 414 F.2d 1213, 1213-14 (D.C. Cir. 1969).

*Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wis. 1969), rev'd on other grds. 442 F.2d 29 (7th Cir. 1971), also held that a juvenile is entitled to a hearing on the existence of probable cause prior to continued detention after arrest. The court saw the need for a probable cause determination as greatest when the arrest was made without a warrant:

Indeed, since the incarceration to which the petitioner was subjected occurred without any judicial determination of probable cause, and prior to any determination of guilt or innocence, the necessity for judicial determination of probable cause during the detention hearing is even more glaring. *Id.*, at 1232.

Clearly, the court was concerned with the absence of any judicial review at either the arrest or the detention stages.

Cases denying detained juveniles the right to a preliminary hearing have done so on a variety of grounds. *Williams v. Sanders*, 80 N.M. 619, 459 P.2d 145 (Sup. Ct. 1964) based its holding on the view that this right is not constitutionally required in criminal cases.\* The New Mexico Court further held that there was no denial of equal protection in the fact that criminal defendants were provided a statutory

\*This basis of the holding is no longer valid under *Gerstein v. Pugh*, 420 U.S. 103 (1975).



right to a preliminary hearing and juveniles were not. The court noted sufficient differences in the consequences of criminal and juvenile proceedings to justify the legislative distinction.

In *People v. Mucci*, 32 N.Y.2d 307, 298 N.E.2d 109 (1973), also decided prior to *Gerstein*, the New York Court of Appeals held that a detained juvenile is not constitutionally entitled to a preliminary hearing. However, the court construed the speedy trial provisions of the New York Family Court Act to provide a functional substitute for the preliminary hearing. Section 747 of the act mandates a full fact-finding hearing within seventy-two hours after a petition is filed if the juvenile is in detention, but Section 748 provides for limited adjournments. The court construed these sections together to require a full fact-finding hearing within three days, which could be delayed only if the petitioner presented facts to the court "to show that there is probable cause to hold the juvenile and such facts . . . do justify the adjournment of the full fact-finding hearing." *Id.*, 298 N.E.2d at 112.

The court suggested two procedures which would meet the mandate of sections 747 and 748: 1. the court could start the fact-finding hearing within the three day period, and, after establishing the equivalent of probable cause, for good cause adjourn the balance of the hearing to another day; 2. the detention hearing could be viewed as an appropriate time to conduct an inquiry into probable cause. In sum, although the court held that a probable cause hearing was not constitutionally mandated, it read the speedy trial provisions in such a way as to require a judicial determination of probable cause for the detained juvenile. See also *Harling v. United States*, 111 U.S. App. D.C. 174, 295 F.2d 161 (1962); *Edwards v. United States*, 117 U.S. App. D.C. 383, 330 F.2d 849 (1964).

The issue of the need for a probable cause determination has also arisen in cases concerning statutory provisions on transfer to criminal court. A recent law review article noted a trend in proposed legislation to include a probable cause requirement in transfer statutes. Speca and White, "Variations and Trends in Proposed Legislation on Juvenile Courts," 40 *U.M.K.C. Law Rev.* 130 (1970-71). See also Alaska Stat. § 47.10.060 (1972); Colo. Rules of Juv. Proc., Rule 25 (1970); Ill. Ann. Stat. ch. 37 § 702-7 (1965); Tex. Stat. Ann. art. 2338-1 § 6 (g), (h) (Vernon 1971); Wyo. Stat. Ann. § 14-115.38 (1971); Uniform Act § 24, all requiring a probable cause determination at the transfer hearing. *Contra*, D.C. Code Ency. § 16-2307 (1970); Minn. Stat. Ann. § 260.125 (1963); Legislative Guide § 31; Standard Act § 13.

*Nondetained juveniles.* When the juvenile is not in detention pending the adjudicatory hearing, the question may nevertheless arise of the right to a probable cause hearing. A number of statutes provide for some form of administrative determination of the sufficiency of the allegations, or the evidence, prior to the filing of a petition or the commencement of informal adjustment conferences. See, e.g., Colo. Rev. Stat. § 22-3-1 (1963); Model Rules, Rules 2, 4; Standard Act § 12; Alaska Juv. Proc. Rules, Rule 4 (1966). This administrative screening is analogous to the screening performed by the police and prosecuting officials in a criminal case. Few statutes address the question of the need for a judicial determination of probable cause prior to the adjudicatory hearing.

The majority of courts that have discussed the need for a judicial determination of probable cause have held that a nondetained juvenile has no right to a preliminary hearing. Several cases have held that since there is no constitutional right to a preliminary hearing in criminal cases, there is no denial of fundamental fairness in failing to provide such a hearing in juvenile cases. *In re Joseph P.*, 60 Misc. 2d 697, 303 N.Y.S.2d 827 (Fam. Ct. 1969); *M.A.P. v. Ryan*, 285 A.2d 310 (D.C.C.A. 1971); *In re T.R.S.*, 1 Cal. App. 3d 178, 81 Cal. Rptr. 574 (Cal. Ct. App. 1969); *In the Interests of D.M.D.*, 54 Wis. 2d 313, 195 N.W.2d 594 (S. Ct. 1972). Of course, these cases all preceded the recent Supreme Court decision in *Gerstein v. Pugh*, discussed above.

In *Joseph P.* the New York Family Court supported its decision by arguing that the speed with which a fact-finding hearing is held in juvenile proceedings, coupled with the requirement that the petition be endorsed by the court in directing the issuance of a summons based upon it, obviates the need for a preliminary hearing.

The logic of *M.A.P. v. Ryan* is similar. The court outlined the provisions of the District of Columbia Juvenile Court Act relating to administrative screening of petitions: preliminary investigation by the intake unit, and inquiry by the corporation counsel into the legal sufficiency of the allegations. The court found these to constitute an adequate protection against the filing of an unfounded petition against the juvenile. One commentator has criticized this logic as failing to meet the proposition, found in criminal cases, that the intervention of a neutral, detached magistrate is necessary to safeguard the accused against unfounded prosecution initiated by overzealous prosecutors. Note, 4 *Rutgers-Camden L.J.* 171, 178 (Fall 1972). See also *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Only one court has held that a nondetained juvenile has the right

to a preliminary hearing. In *Brown v. Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971), the court held that a juvenile returned to the custody of his mother following his apprehension by the police was entitled to a judicial determination of the legality of the seizure. The court ruled the Fourth Amendment applicable "to everyone arrested for conduct defined as a crime. . . . It is the arrest, not simply continued detention, to which the Amendment attaches." *Id.*, at 841. The court rested its conclusion on two theories. First, it noted that the juvenile is placed in the "status" of an arrestee and that the legality of that status (and the stigma imposed thereby) was subject to determination; second, the court argued that the juvenile was in a type of "custody" (that of his mother, subsequent to the arrest), and that "the right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody." *Id.*, at 842. While the court in *Brown* spoke of the juvenile's right to a determination of probable cause in terms of testing the legality of the seizure, the court envisioned the required preliminary hearing as including a determination of the legal sufficiency of the evidence to bind the juvenile over for the adjudicatory hearing.

Standard 4.1 A. works a compromise between the rights to a probable cause hearing and to a speedy trial. In those delinquency cases not speedily tried—either because trial preparation is complex or time-consuming, or because of the unavailability of witnesses—the standard recommends that the juvenile be entitled to a judicial determination of probable cause. This has been recommended because of the psychological, social, and economic hardships that may be imposed on a juvenile by the mere filing of a petition. The standard also responds to the asserted constitutional right of the juvenile to a judicial determination of probable cause as a matter of due process or equal protection, under cases such as *Brown* and *Gerstein*. Even if the juvenile is not detained pending adjudication, the juvenile may suffer a considerable restriction of liberty as the result of the filing of a petition and hence, under *Gerstein*, should be entitled to a hearing. As one commentator has noted: "He is foreclosed from military service or Job Corps placement until the pending charges are settled. In addition, he lives under the shadow of the accusation—sometimes for a year or more." Kolker, "The Test Case and Law Reform in the Juvenile Justice System," 1 *Yale Rev. of L. & Soc. Action* 64, 69 (Winter 1970). It may also be the rule that the juvenile cannot leave the jurisdiction while the charges are pending, and the juvenile may be subject to psychiatric or physical examination perhaps pursuant to a custodial remand.

Such intrusions are unjustifiable in cases in which the charges are

without merit or substance. The typical administrative review given petitions is inadequate to protect the juvenile's interests. Intake screening personnel will generally focus on issues such as the need for judicial action in the case, in light of the juvenile's history and environment. The prosecutor, in deciding whether to file a petition, may inquire only superficially into the legal sufficiency of the allegations and probably will not have interviewed the state's witnesses. Unless a probable cause hearing is held, the prosecutor may not have the opportunity to learn details of the case until the day of trial.

Although arguments can be advanced against it, there are overriding reasons for providing the right to a judicial hearing. Some have argued that preliminary hearings may consume a significant amount of judicial time and impose a burden on those police officers, witnesses, and complainants who are required to testify at the hearing. The extent of this time burden is at present a matter of speculation, for there are no empirical studies on the point. The danger of holding juveniles on non-meritorious charges seems a graver threat than the additional burden that permitting such hearings may entail, especially since it is likely that the right would be waived in many cases and obviated in many others by the holding of a prompt trial. The present tendency to use the preliminary hearing primarily as a discovery device should be reduced by adoption of the liberal discovery provisions recommended in Part III.

It may also be argued that preliminary hearings will be unfeasible in rural areas in which only one judge hears all juvenile matters. In those courts, the juvenile's right to an adjudicatory hearing before an impartial tribunal would be prejudiced if the judge had already heard evidence in the case at the probable cause hearing. However, due to the smaller caseload in these courts, it should be possible to utilize the speedy trial alternative to the probable cause hearing to avoid this difficulty.

Standard 4.1 B. provides that if no probable cause hearing has been held earlier, all detention and transfer hearings should commence with a consideration of probable cause. The probable cause determination should constitute the first part of these hearings in order to avoid having social information, records of prior offenses, and other prejudicial material come before the judge prior to the determination of probable cause. If the judge fails to find probable cause, the need to consider the propriety of detention or transfer will be eliminated. Furthermore, certain procedural safeguards which are afforded the juvenile during the probable cause hearing—particularly the privilege against self-incrimination—may be unavailable to, or waived by, the juvenile at the detention or transfer hearing. In order to insure that

the probable cause hearing is not infected by the receipt of prejudicial evidence, it is necessary to decide the probable cause issue at the start of the hearing.

Standard 4.1 A. has no analogue in juvenile court statutes. Standard 4.1 B. is derived from D.C. Code § 16-2312 (1970).

#### 4.2 The conduct of a probable cause hearing.

A. The probable cause hearing should be held before a judge of the juvenile court. The judge should inform the juvenile of his or her rights as provided by Standard 2.2 B.

B. The prosecutor should be required to present evidence of probable cause as to every element of the offense and as to the respondent's identity as the perpetrator. The finding of probable cause should not be based upon hearsay in whole or in part. The respondent should have the opportunity to cross-examine witnesses and to introduce evidence and witnesses on his or her own behalf.

#### *Commentary*

Standard 4.2 A. implements the theory of detached judicial review by requiring the probable cause hearing to be held before a judge of the juvenile court. Under exceptional circumstances, such as the one-judge juvenile court, it may be possible to appoint a judicial officer solely for the purposes of conducting probable cause, detention, and transfer hearings. The judge must inform the juvenile of his or her rights, including the mandatory right to counsel as provided in Part V of these standards, and the due process rights afforded by *In re Gault*, 387 U.S. 1 (1967), and its progeny. Standard 4.2 B. follows criminal procedure in requiring the prosecutor to present evidence of probable cause as to every element of the offense and as to the juvenile's identity as the perpetrator. Amsterdam, Segal, and Miller, *Trial Manual for the Defense of Criminal Cases* § 127 (1971). However, the standard departs from current criminal practice in federal and most state courts by providing that the finding of probable cause should not be based on hearsay evidence. *Cf.* Fed. R. Crim. P. 5.1 (1973); but see Cal. Evid. Code § 300 (West Supp. 1968); Tex. Crim. Code art. 16.07 (1966); see also cases collected in Note, 15 *Kan. L. Rev.* 374, 376 at n. 33 (1967).

The elimination of hearsay as a basis for the finding of probable cause will in many instances require a lay complainant to testify at the hearing. Despite the fact that this provision, like the standard's provision for cross-examination and presentation of evidence by the

respondent, is not constitutionally mandated, *Gerstein v. Pugh*, 420 U.S. 103 (1975), it serves the overriding need to screen out insubstantial cases at an early stage of the proceedings. The elimination of hearsay may create problems for rural courts, particularly in cases requiring laboratory reports or other evidence from distant sources. It may be possible to expedite the trial in such cases or find other remedies. Otherwise, courts may have to depart from the standard to the extent required by those special geographic circumstances.

Standard 4.2 B. provides the respondent with the right to cross-examine witnesses and introduce evidence in his or her own behalf. These safeguards are the minimum required in an adversary proceeding which has a significant effect on the juvenile's liberty and are generally accorded in criminal probable cause hearings. Graham and Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations," 18 *U.C.L.A. L. Rev.* 687-88 (1970-71); *United States ex. rel. Wheeler v. Flood*, 269 F. Supp. 194 (E.D.N.Y. 1967); Amsterdam, Segal, and Miller, *supra*, § 15. But see *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Standard 4.2 has no analogue in the juvenile statutes. Portions of the standard are derived from the Federal Rules of Criminal Procedure, Rule 5.1 (1973).

## PART V: RESPONDENT'S RIGHT TO COUNSEL

### 5.1 Scope of the juvenile's right to counsel.

A. In delinquency cases, the juvenile should have the effective assistance of counsel at all stages of the proceeding.

B. The right to counsel should attach as soon as the juvenile is taken into custody by an agent of the state, when a petition is filed against the juvenile, or when the juvenile appears personally at an intake conference, whichever occurs first. The police and other detention authorities should have the duty to ascertain whether a juvenile in custody has counsel and, if not, to facilitate the retention or provision of counsel without delay.

C. Unless waived by counsel, the statements of a juvenile or other information or evidence derived directly or indirectly from such statements made to the intake officer or social service worker during the process of the case, including statements made during intake, a predisposition study, or consent decree, should not be admissible in evidence prior to a determination of the petition's allegations in a delinquency case, or prior to conviction in a criminal proceeding.

*Commentary*

*Introduction.* This standard provides that respondents in delinquency cases should have "the effective assistance of counsel at all stages of the proceeding." As implemented by Standard 5.2, this means that the juvenile's right to counsel should not be defeasible for any reason, including willingness to waive the right, parental refusal to employ counsel, or financial ineligibility for appointed counsel. This proposal for mandatory defense counsel departs from the law and practice of most jurisdictions.

The reasons for recommending that the juvenile's right to counsel not be waivable are discussed immediately below. Financial eligibility is discussed in the commentary to Standard 5.3.

*Waivable vs. mandatory counsel.* The fourteenth amendment due process clause clearly guarantees the right to counsel in delinquency proceedings "which may result in commitment to an institution in which the juvenile's freedom is curtailed." *In re Gault*, 387 U.S. 1, 41 (1967). Furthermore, if the respondent and parents are unable to afford counsel, the court must appoint counsel to represent the respondent. *Id.* Although the *Gault* opinion indicated that the right to counsel might be waived, it did not make clear whether waiver could be accomplished by the juvenile, the parent, or the two together.

In the wake of *Gault*, legislatures responded with a variety of approaches to waiver. The majority allowed waiver of the right to counsel in some manner. Some statutes provide the right to counsel but are silent as to whether the right may be waived. D.C. Code Ency. § 16-2304(a) (1970); Va. Code Ann. § 16.1-173 (1974). Some statutes state or imply that a failure to request counsel constitutes waiver, Uniform Act § 26(a) (1968); Ariz. Rev. Stat. Ann. § 8-225 (Supp. 1974); Wyo. Stat. Ann. § 14-115.23 (Supp. 1973); Colo. Children's Code § 22-1-6(1)(b)(c) (1967). Others require an express waiver but fail to indicate whether it can be effected by the juvenile alone, or if parental concurrence is necessary, Nev. Rev. Stat. § 62.195(2) (1973). Some statutes permit the juvenile to waive the right alone, if the waiver is intelligent, Cal. Welf. & Inst'ns Code § 634 (1971). Minnesota requires the concurrence of juvenile and parents if the juvenile is fourteen years of age or older, but permits waiver by the parent alone if the juvenile is younger. Minn. Rules for Juv. Proceedings, Rule 1-5 (1974). Some states require the concurrence of parent and juvenile in all cases, N. M. Stat. Ann. § 13-14-25 (E) (1973). A few states make counsel nonwaivable under certain circumstances, Minn. Rules for Juv. Proceedings, Rule 1-5 ("serious"

cases); Tex. Fam. Code Ann. § 51.10 (1973) (at certain stages of proceedings). In federal delinquency proceedings, and in the District of Columbia, representation by counsel is mandatory. 18 U.S.C. §§ 5032, 5034 (1974); D.C. SCR.-JUV. 44 (1970). See also Legislative Guide § 25(a), recommending a nonwaivable right.

The case law on waiver of counsel in delinquency proceedings is less varied. The overwhelming majority of courts reject the view that a juvenile alone is per se incompetent to waive counsel. They apply the "totality of circumstances" test to determine the validity of a waiver. This test derives from the Supreme Court opinion in *Johnson v. Zerbst*, 304 U.S. 458 (1938), a criminal case:

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Id.* at 464.

The reviewing court will focus on such factors as the respondent's age, *United States ex rel. B. v. Shelley*, 305 F. Supp. 55 (E.D.N.Y. 1969); physical condition, *In re L.*, 287 N.Y.S.2d 218 (1968); educational background, *Application of Estrada*, 403 P.2d 1 (Ariz. 1965); previous contacts with law enforcement officials, *In re H.L.R.*, 75 Cal. Rptr. 308 (1969); the presence or absence of parents, *Id.*; and, conflicts of interest between the juvenile and parents, *In re Ricky H.*, 86 Cal. Rptr. 76 (1970). On the basis of these factors, the reviewing court will determine whether the juvenile's waiver was voluntary and intelligent. *In re J.F.T.*, 320 A.2d 322 (D.C.C.A. 1974); *In re Wise*, 291 So. 2d 727 (Miss. 1974).

In a few jurisdictions, however, the courts have held that the juvenile alone is per se incapable of making a valid waiver, and that juveniles may only waive counsel with the advice of a parent. *Bridges v. State*, 299 N.E.2d 616 (Ind. 1973); *In re K.W.B.*, 500 S.W.2d 275 (Mo. 1973); *In the Matter of Rust et al.*, 53 Misc. 2d 51, 278 N.Y.S.2d 333 (Fam. Ct. 1967); *Freeman v. Wilcox*, 167 S.E.2d 163 (Ga. 1969). Finally, in Texas a juvenile may not waive counsel except with the advice of counsel, *In re R.E.J.*, 511 S.W.2d 347 (Texas 1974).

This standard adopts the view that counsel is necessary in delinquency proceedings to protect the interests of the juvenile, and the right should therefore be nonwaivable. This is now the federal rule, 18 U.S.C. §§ 5032, 5034 (1974) and it has also been adopted in the



several other jurisdictions cited above. As stated by the 1967 Task Force Report:

. . . providing counsel only when the child is sophisticated enough to be aware of his need and to ask for one or when he fails to waive his announced right is not enough, as experience in numerous jurisdictions reveals. Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by the child or parent. President's Commission on Law Enforcement and Administration of Justice, "Task Force Report: Juvenile Delinquency and Youth Crime" 34 (1967).

Mandatory representation not only protects the juvenile, but assists the court in handling cases efficiently. Also, the presence of defense counsel facilitates obtaining effective waivers of other rights by the juvenile. (See Part VI.) The "totality" test by which most courts judge the validity of waivers is difficult to administer, and invites uncertainty at all stages of the proceedings. It has been criticized by many commentators. See, e.g., Comment, "Waiver of Counsel by Minor Defendants," 3 *Tulsa L.J.* 193 (1966); Fox, *Juvenile Courts in a Nutshell* 165 (1971); Handler, "The Juvenile Court and the Adversary System: Problems of Function and Form," 1965 *Wis. L. Rev.* 7, 34 (1965); Isaacs, "The Lawyer in the Juvenile Court," 10 *Crim. L.Q.* 222, 231 (1968); Lefstein, Stapleton, and Teitelbaum, "In Search of Juvenile Justice: *Gault* and Its Implementation," 3 *L. and Soc. Rev.* 491, 561-62 (1968-69); Note, "Juvenile Case Law After *Gault*," 8 *J. Fam. L.* 416, 428 (1968); Note, "Pre-Interrogation Waiver of Constitutional Rights by Juveniles," 14 *Ariz. L. Rev.* 487 (1972); "Position Statement for National Conference on the Role of the Lawyer in Juvenile Court" (Chi., Ill. Feb. 27-29, 1964) in National Council of Juvenile Court Judges, *Counsel for the Child*, 2 (1964); Skoler, "The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings," 43 *Ind. L. J.* 558, 572 (1967-68). Few juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful. One study indicates that in waiving *Miranda* rights, 86 of 90 minors waived without a thorough understanding of their action. Ferguson and Douglas, "A Study of Juvenile Waiver," 7 *San Diego L. Rev.* 39, 53-54 (1970).

Nor does the requirement that the juvenile's parent advise the juvenile and/or concur in the waiver cure these difficulties. Studies indicate that, for several reasons, parents may be of little aid to their

children in deciding whether to waive counsel. The parents may themselves not be able to adequately understand the consequences of waiver, and may be equally swayed by official pressures to waive. Lefstein, Stapleton, and Teitelbaum, "In Search of Juvenile Justice," *supra*; Schlam, "Police Interrogation and 'Self'-Incrimination of Children by Parents; A Problem Not Yet Solved," 6 *Clearinghouse Rev.* 618 (1973). In order to appear "cooperative," parents may in fact increase the pressure on their children to waive their rights. McMillian and McMurtry, "The Role of Defense Counsel in the Juvenile Court—Advocate or Social Worker?" 14 *St. Louis U.L.J.* 561 (1970).

In recommending that the respondent's right to counsel in delinquency proceedings should be nonwaivable, this standard is not intended to foreclose absolutely the possibility of *pro se* representation by a juvenile. A number of courts have recognized the right of a criminal defendant to waive counsel and conduct his or her own defense. *U.S. v. Plattner*, 330 F.2d 271 (2d Cir. 1964); *U.S. ex rel. McCann*, 317 U.S. 269 (1942). The right is recognized by state constitutions and statutes in some jurisdictions. But the majority view is that the right to appear *pro se* in criminal cases is qualified by the public interest in maintaining a fair trial process. See, e.g., *People v. Sharp*, 499 P.2d 489 (Cal. 1972), *U.S. v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). In delinquency proceedings, it would be rare for a respondent to possess sufficient maturity to persuade the court that *pro se* representation would result in a fair trial. Comment, "In re Gault and the Persisting Questions of Procedural Due Process and Legal Ethics in Juvenile Court," 47 *Neb. L. Rev.* 558, 570 (1968). It would seem, also, that any "right" to appear *pro se* should apply only if the juvenile indicated a wish to contest the proceedings, not to admit the allegations of the petition.

Subject to those cautions, the court should have discretion, in exceptional cases, to respond affirmatively to a juvenile's positive insistence on appearing *pro se*. In such cases, the court should nevertheless appoint standby counsel to "assist the [respondent] when called upon and to call the judge's attention to matters favorable to the [youth] upon which the judge should rule on his own motion." ABA, *Standards Relating to Function of the Trial Judge* § 6.7 (Tent. Draft 1972); *Faretta v. California*, 422 U.S. 806 (1975).

Little empirical data is presently available to indicate whether the legal personnel now exist to enable courts to conform to a mandatory counsel standard. In rural areas particularly, conformity may be difficult. Nevertheless, regarding those areas that presently lack the

resources to meet this standard, it is recommended as a goal toward which reform should move. Innovative solutions, such as the employment of defense counsel on a regional basis, must be sought.

*Stage at which right arises.* Most juvenile court legislation does not specify the stage of the proceedings at which the juvenile's right to counsel arises. The statutes typically direct that the juvenile and parent be told that they both have a right to separate counsel at "all stages in the proceeding." See, e.g., Colo. Children's Code § 22-1-6(1)(a) (1967); Ohio Rev. Stat. § 2151.352 (1969); S. D. Compiled Laws Ann. § 26-8-22(1) (1974); Legislative Guide § 25. The Federal Juvenile Delinquency Act requires the respondent to be assisted by counsel "at every . . . critical stage of the proceedings." 18 U.S.C. § § 5032, 5034 (1974). Such language leaves open whether, for example, there is a right to counsel at an intake hearing or during custodial interrogation by the police.

A few statutes are more specific. In the District of Columbia the juvenile must be represented at all "judicial hearings" following the filing of a petition. D.C. SCR-JUV. 44. Colorado and the Model Rules extend the right to intake conferences. Colo. Children's Code § 22-1-6 (1967); Model Rules, Rule 39 (1969). In California, the right arises when the juvenile is taken before a probation officer. Cal. Welf. and Inst'ns Code § 627.5. And Minnesota's court rules specify that the youth's right to counsel arises from the "moment he is taken into custody." Minn. Rules for Juv. Proc., Rule 2-1.

Despite the ambiguity of most statutes, courts generally recognize the juvenile's right to counsel during police interrogation, but permit waiver of the right under the "totality of circumstances" test, discussed above.

Standard 5.1 B. specifies the stage in delinquency proceedings when the right to counsel arises and requires that officials having custody of detained juveniles take initiatives to implement the right. The prompt provision of counsel for detained juveniles will relieve pressures on overcrowded detention facilities by speeding the release of juveniles whose continued incarceration there is unnecessary.

Standard 5.1 C. should be compared to the U.S. Children's Bureau, Model Family Court Act § 26 (1975). See also Tex. Fam. Code Ann. § 54.03(e) (1973), construed in *In re R.E.J.*, 511 S.W.2d 347 (Tex. 1974).

## **5.2 Notification of the juvenile's right to counsel.**

As soon as a juvenile's right to counsel attaches under Standard 5.1 B., the authorities should advise the juvenile that representation

by counsel is mandatory, that there is a right to employ private counsel, and that if private counsel is not retained counsel will be provided without cost.

*Commentary*

This standard requires prompt communication to the juvenile of the right to counsel in the proceedings. See also Part II, especially Standard 2.2 B. The notification should be in the juvenile's dominant language, and an interpreter's services should be used if that language is not English.

**5.3 Juvenile's eligibility for court-appointed counsel; parent-juvenile conflicts.**

A. In any delinquency proceeding, if counsel has not been retained for the juvenile, and if it does not appear that counsel will be retained, the court should appoint counsel. No reimbursement should be sought from the parent or the juvenile for the cost of court-appointed counsel for the juvenile, regardless of the parent's or juvenile's financial resources.

B. At the earliest feasible stage of a delinquency proceeding the intake department should determine whether a conflict of interest exists between the juvenile and the parent, and should notify the court and the parties of any finding that a conflict exists.

C. If a parent has retained counsel for a juvenile and it appears to the court that the parent's interest in the case conflicts with the juvenile's interest, the court should caution both the parent and counsel as to counsel's duty of loyalty to the juvenile's interests. If the parent's dominant language is not English, the court's caution should be communicated in a language understood by the parent.

*Commentary*

In criminal proceedings, a defendant may not be "eligible" for court-appointed counsel unless several conditions are met: the defendant must claim, or refuse to waive, the right; the offense must be sufficiently serious; and the defendant must be financially unable to afford the expense of retaining counsel. In proceedings under these standards, the first two conditions have been mooted, since representation is mandatory in all delinquency proceedings. Compare *Argersinger v. Hamlin*, 407 U.S. 25 (1972), holding that the sixth amendment right to appointed counsel in state misdemeanor prosecutions applies only if the defendant is subject to imprisonment.

The third condition, however, is especially complex in delinquency cases. In such proceedings, the question of financial eligibility has several aspects. First, eligibility must be defined in terms of income level or other indices of ability to retain counsel. Second, it must be decided whose financial resources should be considered in evaluating a juvenile's eligibility—the juvenile's or the parents'. Third, if counsel is appointed to represent a juvenile who is financially ineligible to receive the services, should the parent or juvenile be liable to reimburse the court for the costs? The standard takes the position that the concept of financial eligibility is inappropriate for a system of mandatory representation and that no reimbursement should be sought for the costs of any juvenile's court-appointed defense. This departs from the existing law.

Most juvenile court statutes do not specifically define financial eligibility for appointed counsel. In addition to permitting court appointment when necessary, "to protect the interest of the child," see, e.g., Colo. Children's Code § 22-1-6 (1967), statutes often condition appointment on the inability of "the child and his parents" to "afford" or "employ" counsel, e.g., Conn. Gen. Stat. Ann. § 17-66b (1969); Cal. Welf. & Inst'n's Code § 634 (1971); Iowa Code Ann. § 232.28 (1969); or on a finding that their means are "insufficient" to employ counsel, S. D. Compiled Laws Ann. § 26-8-22.2 (1974). But in some jurisdictions the statute directs or authorizes the court to appoint counsel for a juvenile whose parents are financially able to retain counsel and refuse to do so. In that event, the statutes often expressly declare the parents liable to reimburse the court for the costs thereof. See, e.g., Cal. Welf. & Inst'n's Code §§ 634, 903.1 (1971); Conn. Gen. Stat. Ann. § 17-66c (1969); Minn. Rules for Juv. Proc., Rule 2-1(4) (1970).

Even apart from statutes, a parent may be liable to pay the costs of defense counsel for the juvenile as part of the duty to supply the juvenile with necessaries. *In re Ricky H.*, 86 Cal. Rptr. 76, 468 P.2d 204 (1970); Annot., 13 A.L.R.3d 1251, 1256 (1967). But see *In re L.G.T.*, 216 So. 2d 54 (Fla. App. 1968); *People v. Gustavson*, 269 N.E.2d 517 (Ill. App. 1971), *contra*.

To forbear seeking reimbursement from financially capable parents, as recommended by the standard, risks encouraging some parents and juveniles to act like "privileged paupers," deliberately accepting counsel at state expense when they can afford to employ counsel privately. See Comment, "The Definition of Indigency: A Modern-Day Legal Jabberwocky?" 4 *St. Mary's L.J.* 34, 45 (1972); *People v. Gustavson*, 269 N.E.2d 517 (Ill. App. 1971). Arguably, permitting parents to shirk this financial obligation will diminish the

legal resources available to assist those families who are truly needy.

However, persuasive as this reasoning may be, there are even weightier arguments for a no-reimbursement rule. If a reimbursement policy were adopted, it could be applied either in all cases, or only in those which resulted in an adjudication of delinquency. It would be harsh to compel a family, as the standards then would, to employ counsel to defend against ill-founded allegations, and then require them to pay for those services. On the other hand, while to adopt a distinction that required a family to pay only if the juvenile were found delinquent might be constitutional, see *Fuller v. Oregon*, 417 U.S. 40 (1974), it would make little sense in light of the special emphasis on pretrial diversion in juvenile court. It makes more sense, in a system of mandatory counsel, to view appointed defense counsel's services like the services of intake officers, prosecutors and judges. All are necessary for the court to function effectively and should be supported by the public.

It does not seem likely that many financially able parents will abuse a no-reimbursement policy by refusing to retain counsel for a juvenile, thereby forcing court appointment. Although pertinent statistical data were not found, it is clear that the parents of a large, if not overwhelming, percentage of delinquency respondents are not capable of retaining counsel under fair eligibility standards. See Standard 6.9. Of those who are financially able, most will prefer to seek the assistance of the most competent counsel obtainable and, whether justifiably or not, are likely to view court-appointed counsel as less competent than retained counsel.

Financially able parents who decline to retain counsel for their children are most likely acting from an attitude of unconcern, if not antagonism, toward the child. Parents often resent their children for the trouble, embarrassment and expense brought upon the family by court involvement. In such circumstances, requiring the parent to pay for an attorney that the state insists be employed can only aggravate the parent's hostility to the juvenile. Compare *In re Ricky H.*, 36 Cal. Rptr. 76, 468 P.2d 204 (1970); Comment, "Does Parental Liability for Legal Fees Infringe upon a Juvenile's Constitutional Rights?" 10 *Santa Clara Lawyer* 347 (1970). Finally, there is doubt whether a reimbursement system would produce sufficient income to justify the financial and other costs of collection. ABA, *Standards Relating to Providing Defense Services* § 58 B. (Approved Draft, 1968).

Standard 5.3 B. establishes a mechanism for discovering a conflict of interest between a respondent and a parent who has employed counsel in the case. If a conflict exists, it is important that both the

parent and defense counsel be reminded that counsel represents the juvenile, and not the parent. This comports with the general principle that an attorney owes full loyalty to the client, even if the fee is paid by another person. See ABA, *Standards Relating to the Defense Function* § 3.5 (Tent. Draft, 1970). The parent may wish to be represented by separate counsel after the reminder that counsel represents only the juvenile. See Standards 6.8 and 6.9. Another consequence of the court's determination that a conflict exists is the appointment of a guardian *ad litem* to perform the parent's role of assisting the respondent in the case. See Standard 6.7.

**PART VI: WAIVER OF THE JUVENILE'S RIGHTS;  
THE ROLE OF PARENTS AND GUARDIANS *AD LITEM*  
IN THE DELINQUENCY PROCEEDINGS**

**Waiver of the Juvenile's Rights**

**6.1 Waiver of the juvenile's rights: in general.**

A. Any right accorded to the respondent in a delinquency case by these standards or by federal, state, or local law may be waived in the manner described below. A juvenile's right to counsel may not be waived.

B. For purposes of this part:

1. A "mature respondent" is one who is capable of adequately comprehending and participating in the proceedings;

2. An "immature respondent" is one who is incapable of adequately comprehending and participating in the proceedings because of youth or inexperience. This part does not apply to determining a juvenile's incapacity to stand trial or otherwise participate in delinquency proceedings by reason of mental disease or defect.

C. Counsel for the juvenile bears primary responsibility for deciding whether the juvenile is mature or immature. If counsel believes the juvenile is immature, counsel should request the court to appoint a guardian *ad litem* for the juvenile.

D. A mature respondent should have the power to waive rights on his or her own behalf, in accordance with Standard 6.2. Subject to Standard 6.3, the rights of an immature respondent may be waived on his or her behalf by the guardian *ad litem*.

*Commentary*

*Introduction.* This standard deals with waiver of the juvenile's rights before adjudication in delinquency proceedings. These rights

include: the privilege against self-incrimination; the right to be tried as a juvenile or an adult, where that choice exists; the right to a trial, and, in some jurisdictions, the right to be tried by a jury, or in public; and the right to appeal or pursue other post-adjudication remedies. They also include other, less fundamental rights of a juvenile delinquency respondent.

Several important questions come together in the consideration of waiver in delinquency proceedings. First, there is the question of whether the juvenile's rights may be waived at all, or may be waived without approval of the court. Assuming that some or all of the rights of a delinquency respondent should be waivable, a second question arises: Should the juvenile alone be able to waive the rights or should an adult, such as a parent or guardian *ad litem*, be given the power to waive rights on behalf of the juvenile, or to participate in some way in the waiver decisions? If, as these standards propose, only juveniles of a certain maturity level should be able to waive rights "on their own," criteria must be established for identifying those children. A third question arises once it is decided that juveniles will be permitted the discretion to waive their procedural rights: what safeguards are required to protect the integrity of such waivers, to ensure that they are made with understanding and volition?

Most jurisdictions have permitted waiver by juveniles with certain safeguards, such as the prior opportunity to consult with parents or counsel. The test generally used for retrospectively judging the validity of such waivers has been that developed in criminal jurisprudence: whether, considering the juvenile's age, intelligence, maturity and prior experience, and the context in which waiver took place, the "totality of circumstances" revealed a competent, intelligent, and voluntary waiver. See commentary to Standard 5.1. But this law has developed almost exclusively in cases in which the juvenile was not represented by counsel at the time of the waiver in question. Indeed, in most reported cases, the rights waived included the right to counsel itself.

The question of what waiver procedures and tests are appropriate to the system of mandatory counsel which these standards adopt (Standard 5.1) is relatively new. Presumably, given the presence of conscientious counsel, the issue of the validity of waivers by juveniles should not arise as frequently as it has heretofore. But appropriate procedural safeguards are still needed to guide the courts, police, and defense counsel in the proper administration of waivers.

This standard adopts the following basic propositions:

1. The procedural rights of juveniles in delinquency proceedings, other than the right to counsel should be waivable;



2. In most cases, juveniles advised by counsel and parents are capable themselves of deciding whether to exercise or waive their fundamental rights.

3. The rights of respondents who are too immature to make such decisions, even with the advice of sympathetic and knowledgeable adults, should also be waivable, except for the right to be tried. No plea admitting the allegations of delinquency should be entered on behalf of an immature juvenile.

4. If a juvenile is too immature to instruct counsel, a guardian *ad litem* (who may be the parent) should be appointed to instruct counsel on behalf of the juvenile and to decide whether fundamental rights of the juvenile should be exercised or waived.

*Background.* At common law, juveniles, like mental incompetents, were considered incapable of engaging in litigation in their own behalf. Therefore, if sued, the juvenile would need a special court-appointed guardian, called a guardian *ad litem*, to act as the juvenile's legal representative in the suit. Note, "Guardians *Ad Litem*," 45 *Iowa L. Rev.* 376, 377 (1960). In civil cases, representation by a guardian *ad litem* is necessary to validate judgments against a juvenile, and it is generally held that judgments obtained without appointment of a guardian *ad litem* are voidable. *Id.* at 381. Not only are juveniles incapable themselves of waiving any rights in the proceedings, but, without the court's permission, the guardian *ad litem* cannot waive any substantial rights of the juvenile or make any admission against the interest of the juvenile. Comment, "Waiver in Juvenile Proceedings," 23 *Baylor L. Rev.* 467, 470 (1971).

The civil procedure model, according to which every juvenile must have a guardian *ad litem*, and no substantial rights of the juvenile are waivable without a judicial determination that waiver would serve the juvenile's best interest, has not been adopted in criminal or juvenile delinquency procedure. Guardians *ad litem* are not used in criminal proceedings. In juvenile delinquency proceedings, guardians *ad litem* are generally appointed only if the juvenile's parent is either absent or hostile. See Standard 6.7, and commentary thereto. Neither the parent nor a guardian *ad litem* appointed as a parent substitute stands, as in civil proceedings, in the place of the respondent.

The law does not consider respondents in delinquency cases as *non sui juris*. Our discussion of waiver of the juvenile's right to notice, commentary to Standard 1.7, and to the assistance of counsel, commentary to Standard 5.1, shows that the law recognizes the capacity of most juveniles, especially if advised by a competent, friendly

adult, to waive their procedural rights. But there is much confusion regarding the exact conditions under which juveniles may make valid waivers and about what rules govern waivers by juveniles who are clearly too immature to make intelligent waivers, even with competent adult advice.

*“Mature” and “immature” respondents.* Standard 6.1 B. divides delinquency respondents into two groups: “mature” and “immature” respondents. “Mature respondents” are defined as those who are “capable of adequately comprehending and participating in the proceedings.” “Immature respondents” are those who are “incapable of adequately comprehending and participating in the proceedings because of youth or inexperience.”

The notion of different waiver rules for mature and immature respondents has precedent in Minnesota, which permits parents to waive the rights of juveniles under fourteen years of age; if the juvenile is fourteen years of age or older, both the youth and the parent must participate in any waiver. Minn. JCR. 1-5(3) (1970). And see Model Rules, Rule 37 (1969) (parents of a juvenile under twelve must receive notices instead of the juvenile). The criterion of “capacity to adequately comprehend and participate in the proceedings” in Standard 6.1 B. was chosen instead of an age standard because of its greater flexibility. Although administration of the standard will inevitably vary according to the administrators’ personal experiences and philosophies, counsel’s judgment on the matter should carry great weight, for counsel will have the most opportunity to test the juvenile’s capacity in the context of the proceedings. In deciding whether a client is sufficiently mature to make fundamental decisions in the case, counsel is, of course, bound by high standards of professional ethics.

This standard is based on the view that most juveniles involved in delinquency proceedings fall into the “mature” category, and therefore should, under Standard 6.1 D., have the power to waive their rights after advice by counsel and an opportunity to consult with parents. Given such support, it seems clear that most juveniles are as capable of deciding their own best interests in the proceedings as is the average criminal defendant.

*Waiver for immature respondents.* The most difficult problem concerns waiver of the rights of the relatively small percentage of respondents who, because of extreme youth or immaturity, are incapable, even with the advice of counsel and parents, of adequately comprehending and participating in the proceedings. As to these respon-

dents, three approaches seem possible: no waiver, waiver by counsel, or waiver by the parent or parent substitute. This standard chooses the third approach, and goes further to provide that the parent (or other adult) may waive the juvenile's rights only after having been appointed by the court to act as guardian *ad litem*.

Given the mandatory presence of counsel, there is little merit in a blanket rule of nonwaiver. In many cases it will serve the respondent's interest to permit waiver of a right, such as the right to timely notice, to a probable cause hearing or to a jury trial. Some person should have the power to make such waiver decisions on behalf of immature juveniles, in order to avoid the penalty they might pay if the rule were otherwise. The one exception to this general principle concerns the right to trial itself (Standard 6.3 A.). The negative consequences of a plea admitting the allegations of a delinquency petition may be severe. It therefore seems unacceptable to permit anyone, including counsel, parent, and guardian *ad litem*, to waive the right to have the allegations proven at trial, on behalf of a respondent who is, by definition, incapable of appreciating those consequences.

A rule permitting the immature respondent's attorney to decide whether the juvenile's fundamental procedural rights should be waived would be very appealing. Already familiar with the legal and factual problems presented by the case, counsel is arguably best suited to decide what posture, at any stage of the proceedings, will best serve the client's interest. Indeed, in order to competently serve the client, counsel is duty bound to make such determinations and advise the client accordingly. From there it seems a small step to permitting counsel to make the decision alone on behalf of the client. Giving the attorney this power has the further advantage of simplicity, and therefore efficiency, in that it centralizes decision-making power in the case.

But there are serious drawbacks to this approach. As stated by the Vermont Supreme Court in *In re Dobson*, a case holding it improper to permit the juvenile's attorney in the case to act also as the guardian *ad litem*:

An attorney can effectively argue the alternative courses open to a client only to one assumed to be capable of making a discriminating choice. The minor is presumed to be incapable and under disability, hence the need of a guardian *ad litem* to weigh alternatives for him. Yet a lawyer attempting to function as both guardian *ad litem* and legal counsel is in the quandary of acting as both attorney and client, to the

detriment of both capacities and the possible jeopardizing of the infant's interests. 125 Vt. 165, 168, 212 A.2d 620, 622 (1965).

Plainly, conflict of interest problems might arise if the attorney were able first to decide that the client was too immature to instruct the attorney in the case, and then to make client decisions alone; for there may be extraneous pressures on the attorney, such as a heavy caseload, which cause forbearance in the exercise of client rights. In view of these difficulties, and of the desirability of freeing counsel's energies for tasks attorneys are specially trained to perform, this standard vests the power to make client decisions for immature respondents in other hands. This is accomplished by the court's appointment of a guardian *ad litem*.

Although Standard 6.7 gives the court broad discretion to decide whom to appoint as guardian *ad litem*, normally the juvenile's parent will be appointed. But if the juvenile opposes that choice, or if there is reason to believe that the parent's interest in the proceedings conflicts with the interest of the respondent, see Standard 5.3 B., then the court should appoint someone other than the parent (and other than the juvenile's counsel) as guardian *ad litem*. The guardian *ad litem*, in consultation with the juvenile and with counsel, will instruct counsel in the case, and make the decisions to exercise or waive fundamental rights on behalf of the immature juvenile.

An alternative scheme would have the juvenile's counsel, after deciding that the client is too immature to act, simply so inform the parent, and ask the parent to make the necessary "client" decisions. This practice would avoid the delay and expense of a judicial proceeding to appoint the parent as guardian *ad litem*. But several considerations underlie the choice to obtain court appointment.

First, in many instances there are conflicts of interest between parent and juvenile which are not readily apparent. It would therefore be undesirable to create a system that, by its informality, tempted counsel to allow the parent to "take over" the juvenile's case. Requiring counsel to request appointment of a guardian *ad litem* forces a clear distinction between the functions of parents *qua* parents (see Standard 6.5), and the function of parents instructing counsel on behalf of a juvenile too immature to do so alone. Unless the parent's role is redefined by appointment as the juvenile's guardian *ad litem*, parental functions will be clearly limited to those set out in Standard 6.5, which fall considerably short of the right to control the decisions in the case.

The second reason for recommending that counsel seek appoint-

ment of a guardian *ad litem* to waive the rights of immature juveniles, rather than resort informally to the juvenile's parent, is to focus attention on the parent's suitability to function in the guardian role. Parent-juvenile conflicts will not normally be so serious or dramatic as to lead to displacement of the parent by a guardian *ad litem*, under Standard 6.7 A. 3.

However, if the parent of an immature juvenile is to play the principal role of client, subsurface parent-juvenile conflicts deserve more attention. The formal process for appointing a guardian *ad litem* should focus the attention of counsel, probation staff, and the judge on that issue. See Standard 6.7 D. 1.

The final reason for recommending appointment of a guardian *ad litem* is to create a record to protect the proceedings against later attack. If counsel were, *sua sponte*, to treat the parent instead of the juvenile as "the client," resulting waiver decisions might be subject to later attack on the ground that the juvenile was sufficiently mature to make decisions on his or her own behalf. Appointment of the parent or another person as guardian *ad litem* under Standard 6.7 A. 1. forces counsel to disclose the decision on maturity to the court, permits the court to accept or reject counsel's determination, and creates a judicial record in case of appeal. It also provides a mechanism for the juvenile's parent or the court to question a determination by counsel that the juvenile *is* sufficiently mature to act on his or her own behalf. See commentary to Standard 6.7 A.

It is true that the requirement that the court make a record when administering express waivers ensures that, at least with regard to some waivers, sooner or later the court must concern itself with the juvenile's capacity to waive rights. See Standard 6.4 and commentary thereto. But the guardian *ad litem* device encourages the parties to settle the question of capacity early in the proceedings. Hopefully, the time spent in the appointment process will result in savings at later stages of the proceedings.

An exception to counsel's duty, under Standard 6.1 C., to request the appointment of a guardian *ad litem* for an immature respondent, may arise in rare cases when counsel does not become aware of the client's immaturity until after a guardian *ad litem* has been appointed for other reasons. For example, the court may have appointed a guardian *ad litem* because the juvenile appeared without a parent (Standard 6.7 A. 2.), or because of a parent-juvenile conflict of interest (Standard 6.7 A. 3.). In such cases, counsel can informally request the guardian to assume decision-making responsibilities in addition to those exercised as a parent substitute. This enlargement of the guardian *ad litem*'s role should subsequently be disclosed to the court if

any of the juvenile's substantial rights are waived. See Standard 6.4 A. 1.

### 6.2 Waiver of the rights of mature respondents.

A. A respondent considered by counsel to be mature should be permitted to act through counsel in the proceedings. However the juvenile may not personally waive any right:

1. except in the presence of and after consultation with counsel; and

2. unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding the decision. If the parent requires an interpreter for this purpose, the court should provide one.

B. The decision to waive a mature juvenile's privilege against self-incrimination; the right to be tried as a juvenile or as an adult where the respondent has that choice; the right to trial, with or without a jury; and the right to appeal or to seek other postadjudication relief should be made by the juvenile. Counsel may decide, after consulting with the juvenile, whether to waive other rights of the juvenile.

#### *Commentary*

*General.* This standard is based on the policy that juveniles considered by counsel to be "mature" as defined in Standard 6.1 B. 1. should be permitted to exercise and waive their own rights in delinquency proceedings, subject to certain limitations.

*Qualifications of the right.* Standard 6.2 A. contains two limitations on the capacity of mature juveniles to effect valid waivers. The first, requiring the presence of and prior consultation with counsel, is a corollary of the juvenile's right to counsel. The major purpose of mandatory representation by counsel in these standards is to protect the juvenile from waivers that are made without the advice of counsel. See commentary to Standard 5.1. Unless counsel is present and confers with the juvenile (facts that the official administering a waiver will record, under Standards 6.4 A. 2. and 3.), counsel cannot perform effectively.

Standard 6.2 A. 2. is intended to protect the mature juvenile and to protect parental interests. Courts and legislatures have frequently recognized the protective function which parental presence and advice can serve. See, e.g., *Lewis v. State*, 288 N.E.2d 138 (Ind. 1972); *In re K.W.B.*, 500 S.W.2d 275 (Mo. App. 1973); *State v.*

*White*, 494 S.W.2d 687 (Mo. App. 1973); Minn. JCR 1-5, 2-2(1) (1970); N. M. Stat. Ann. § 13-14-25 (Supp. 1973).

As discussed in the commentary to Standard 6.5, the involvement of a friendly adult other than counsel is useful even for mature juveniles. That is particularly true with regard to decisions to waive important rights, such as the right to be tried as a juvenile or the right to have a trial instead of admitting the allegations of the petition. Parental involvement in important waiver decisions would be justified even if it did not contribute to the fairness and accuracy of the proceedings, so long as it did not harm the respondent, because parents have an important interest in the outcome of delinquency proceedings. See commentary to Standard 6.5.

If the parent is hostile or unavailable, and a guardian *ad litem* has been appointed to act in the parent's place, the guardian should have the opportunity to consult with the juvenile and the juvenile's counsel regarding the waiver decision.

*Allocation of decision-making power.* As stated in the preface to Standard 6.2 A., the limitations discussed above apply only to waivers that the juvenile "personally" executes, and not to the waiver of every single right. In delinquency proceedings, as in criminal proceedings, certain decisions are so fundamentally important that the law requires the client to make them personally. If the client decides in favor of waiver, such decisions are usually recorded.

However, decisions to exercise or waive certain other client rights are more in the nature of trial strategy or tactics, and the client will ordinarily be bound by counsel's actions. See generally ABA, *Standards Relating to the Defense Function* §§ 5.2, 8.2, commentary at 238-39, 290-91 (Tent. Draft, 1970); Comment, "Criminal Waiver: The Requirements of Personal Participation, Competence, and Legitimate State Interest," 54 *Calif. L. Rev.* 1262 (1966).

Standard 6.2 B. states which rights are so important that the juvenile alone, if mature, should decide whether to exercise or waive them. In making the decision the juvenile should, of course, have the benefit of full attorney and parental advice (Standard 6.2 A.). Rights other than those listed in Standard 6.2 B. include decisions on such questions as what witnesses to call, whether and how to conduct cross-examination, and what trial motions should be made. See ABA, *Standards Relating to the Defense Function* § 5.2B. (Tent. Draft, 1970). As to those questions, counsel should consult with the respondent where feasible, but "[b]ecause these decisions require the skill, training, and experience of the advocate, the power of decision on them must rest with the lawyer . . ." *Id.*, commentary at 240.

### 6.3 Waiver of the rights of immature respondents.

A. A respondent considered by counsel to be immature should not be permitted to act through counsel, nor should a plea on behalf of an immature respondent admitting the allegations of the petition be accepted. The court may adjudicate an immature respondent delinquent only if the petition is proven at trial.

B. The decision to waive the following rights of an immature respondent should be made by the guardian *ad litem*, after consultation with the respondent and counsel: the privilege against self-incrimination; the right to be tried as a juvenile or as an adult, where the respondent has that choice; the right to a jury trial; and the right to appeal or seek other postadjudication relief. Subject to subsection A. of this standard, other rights of an immature respondent should be waivable by counsel after consultation with the juvenile's guardian *ad litem*.

#### *Commentary*

This standard governs waiver of the rights of a juvenile whom counsel considers to be "immature" as defined in Standard 6.1 B. 2. In such cases, a guardian *ad litem* should be appointed to act on behalf of the juvenile in the proceedings. See commentary to Standard 6.1 and Standard 6.7. This standard is similar to the preceding standard, on mature respondents, except in two respects: the guardian *ad litem* must personally waive the rights that would otherwise be waivable by the juvenile, and no plea admitting the allegations of the petition may be entered.

Unlike Standard 6.2 (mature respondents), this standard does not include any role for the juvenile's parent in the waiver deliberations. That is because in most cases the parent will be the person appointed as guardian *ad litem* for an immature respondent. If not, it will usually be because the parent is absent or is hostile to the juvenile. See commentary to Standard 6.1. If for any reason the guardian *ad litem* is not the parent, and the parent is both available and supportive of the juvenile, it would be desirable to permit the parent access to discussions between counsel and the guardian *ad litem* regarding important waiver decisions.

### 6.4 Recording.

A. Express waivers should be executed in writing and recorded. When administering a waiver of the juvenile's right, the judge or other official should:

1. ascertain whether the waiver is being made by the juvenile or by the guardian *ad litem* on the juvenile's behalf;



2. if the juvenile is waiving a right on his or her own behalf, require counsel to affirm belief in the juvenile's capacity to do so, and affirm that counsel has otherwise complied with the requirements of this part; and

3. ascertain that the juvenile or guardian *ad litem*, as the case may be, is voluntarily and intelligently waiving the right in the presence of and after advice of counsel.

B. Waivers should be executed in the dominant language of the waiving party or, if executed in English and the waiving party's dominant language is not English, should be accompanied by a translator's affidavit certifying that he or she has faithfully and accurately translated all conversations between the juvenile, parent[s], guardian *ad litem*, counsel, and the court with respect to the waiver decision. The affidavit should be recorded.

#### *Commentary*

*Record of waiver.* The Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), noted that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights . . . and we do not presume acquiescence in the loss of fundamental rights." *Id.* at 464. The Court gave this definition:

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

In subsequent decisions the Supreme Court further explicated this decision.

In *Von Moltke v. Gillies*, 332 U.S. 708 (1947), the Court emphasized the duty of the trial judge to inquire searchingly into the question of the criminal defendant's understanding of the consequences of a waiver of counsel. A valid waiver, the Court said,

must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *Id.* at 724.

"In the absence of a record of offer and waiver, the presumption is that the offer was not made and that there was no waiver." ABA,

*Standards Relating to Providing Defense Services* § 65 (Approved Draft, 1968), citing *Carnley v. Cochran*, 369 U.S. 506, 513-17 (1962); *In re Johnson*, 53 Cal. Rptr. 1, 4 (Cal. App. 1966). As the ABA suggests, the requirement that the waiver be recorded guards the proceedings against appellate challenge. ABA, *Standards Relating to Providing Defense Services* § 65 (Approved Draft, 1968).

In *In re Gault*, 387 U.S. 1 (1967), the Supreme Court clearly indicated that the general principles governing waiver of constitutional rights in criminal proceedings will also apply in delinquency proceedings with "some differences in technique." *Id.* at 55; see also *Id.* at 42, n. 71. The need to make a record of express waivers in delinquency proceedings is therefore equal to the need in criminal cases.

*Duty of officials.* The language, "a judge or other official," in subsection A. is meant to include police or intake officers administering waivers by the juvenile outside of court. The standard's description of the administering official's obligations is intended to ensure that the waiver is valid, and that the record will reflect the information necessary to withstand unjustified challenge.

The mandatory participation of counsel in waivers of counsel for the juvenile should relieve the official who administers waiver from inquiring in great detail into the juvenile's capacity, understanding, and voluntariness in executing it. If counsel is performing conscientiously, counsel will inform the client fully of the meaning of the right and the consequences of waiving it, determine that the client is capable of making an intelligent waiver, and ensure that the client is doing so voluntarily.

But the fact of counsel's presence cannot discharge the judge or other administering official from the responsibility to look behind the express waiver of a particular right. Such a rule would be suspect both pragmatically and constitutionally. The presumption against the waiver of constitutional rights, the pervasive ineffectualness in some jurisdictions of defense counsel, the lack of incentive for respondent's counsel to make a determination that the juvenile client is incapable of instructing counsel, and the grave importance of waiver decisions, all support the view that some monitoring of the waiver process is necessary. Standard 6.4 A. accordingly requires the administering official to question the participants to ensure that counsel has complied with the duties under this part. The official must ascertain that counsel has advised the client fully of the consequences of waiver; has inquired into the client's capacity, understanding, and voluntariness; and is satisfied that the required conditions for effec-

tive waiver have been met. While counsel is primarily responsible for judging the validity of the juvenile's waiver, the administering official is also required to ask the juvenile and the parent or guardian *ad litem* to confirm that counsel has performed his or her duties.

If the juvenile is insufficiently mature to waive rights on his or her own behalf, then the juvenile's guardian *ad litem* will be the person waiving the juvenile's right. See commentary to Standard 6.1. Accordingly, Standard 6.4 A. 1. directs the court to ascertain whether that is the fact. If so, subsection A. 3. provides that the court should inquire into the guardian's understanding of the waiver, rather than the juvenile's. Standard 6.4 B. governs waivers by a juvenile or other person whose dominant language is not English. The affidavit requirement is intended to impress upon the translator and the parties the importance of waiver, and to protect the waiving party from acting without full understanding. Every effort should be made to ensure that linguistic handicaps do not result in injustice. See generally commentary to Standard 2.3.

#### The Role of Parents and Guardians *Ad Litem* in the Delinquency Proceedings

##### 6.5 The role of parents.

###### A. Except as provided in subsection B.,

1. the parent of a delinquency respondent should have the right to notice, to be present, and to make representations to the court either *pro se* or through counsel at all stages of the proceedings;

2. parents should be encouraged by counsel, the judge, and other officials to take an active interest in the juvenile's case. Their proper functions include consultation with the juvenile and the juvenile's counsel at all stages of the proceedings concerning decisions made by the juvenile or by counsel on the juvenile's behalf, presence at all hearings, and participation in the planning of dispositional alternatives. Subject to the consent of the mature juvenile, parents should have access to all records in the case. If the juvenile does not consent, the court should nevertheless grant the parent access to records if they are not otherwise privileged, and if the court determines, *in camera*, that disclosure is necessary to protect the parent's interests.

B. The court should have the power, in its discretion, to exclude or restrict the participation of a parent whose interests the court has determined are adverse to those of the respondent, if the court finds that the parent's presence or participation will adversely affect the interests of the respondent.

**C. Parents should be provided with necessary interpreter services at all stages of the proceedings.**

*Commentary*

*General.* The role of parents in delinquency proceedings may be viewed from two perspectives: protection of the juvenile's interests, and protection of the parent's interests. The first perspective asks what access to parental assistance and advice the juvenile should have for his or her own protection; the second asks what participatory rights the parent should have to determine the juvenile's posture in the case, or otherwise to influence the case outcome. The first, or "juvenile's rights" perspective has been adopted by courts and legislatures deciding the effect of the parent's participation on the validity of a waiver of the juvenile's right. As elaborated in connection with earlier standards in this volume, the law's responses have varied widely. See commentaries to Standards 1.7 and 5.1 A. The law has barely addressed the parent's role from the second or "parental rights" perspective. When it has, it often reflects the ambiguity displayed in *Gault* about whether procedural rights in delinquency proceedings belong to the juvenile, the parent, or both of them. See *In re Gault*, 387 U.S. 1, 34, 42 (1967); commentary to Standard 6.8.

In most delinquency cases no question of "parental rights" separate and apart from the rights of the respondent will arise. Early in the case, sensitive defense counsel will consult with parents, explain decisions to them, and secure their acceptance if not endorsement of litigation strategies. In this way conflicting views, strategies, and interests will usually be resolved, freeing parents to function cooperatively in ways expressly helpful to the juvenile. Accordingly, several of the standards on parental involvement are drafted primarily from a "juvenile's rights" perspective, focusing on ways in which the parent can assist the respondent in the proceedings. See, e.g., Standards 2.1 A., 2.2 B. 2., 6.2 A. 2., and 6.5 A. 2.

A concerned parent can contribute to the respondent's welfare in the proceedings in numerous ways. The parent can provide the respondent with important moral support and practical advice, help counsel verify the juvenile's capacity or incapacity to understand and function in the proceedings, monitor counsel's performance to ensure that the respondent receives adequate legal service, support the respondent with statements to the court, give counsel useful information on the juvenile's family background and community resources, and assist in the planning and executions of case diversion or disposition. For these reasons, subsection A. 2. of the standard recommends

that parents normally be encouraged to take an active interest in their child's case. In recognition of the value of parental participation for protection of the respondent's rights, Standard 6.7 A. recommends court appointment of a guardian *ad litem* to serve in the place of the respondent's parent if the latter is absent, hostile, or otherwise unavailable.

The most difficult problems arise in the small number of cases where the parent is hostile to the juvenile, or to the strategy employed by an attorney representing a mature juvenile. Because in those cases the parent and juvenile may disagree about the correct procedural posture—*e.g.*, regarding the advisability of a consent decree, a certain plea, or a disposition—the standards must consider the parent's role from the perspective of "parental rights."

Several approaches to defining the parental rights in delinquency proceedings are conceivable. At the extreme, one could contend that the parent *qua* parent should have no procedural rights at all in the case. Thus, for example, the parent would have no right to notice of the proceeding, or to attend hearings. The standards reject that position, and instead adopt the premise that although the juvenile's interest in delinquency proceedings—protection of liberty and reputation—far outweigh those of the parent, the parent still has important interests at stake. The parent's reputation is also threatened, but this interest is comparatively marginal. However, the parent also risks the loss of the custody and companionship of the juvenile, a right which may warrant procedural protections under the fourteenth amendment due process clause. See *Stanley v. Illinois*, 405 U.S. 645 (1972), discussed below.

Three other approaches to the issue of parental rights deserve discussion, all of which recognize that the respondent's parent has interests requiring some procedural recognition. They are: (1) full party status for the parent; (2) parental rights solely to protect the parent's interest in retaining custody of the juvenile ("custodial defense"); and, (3) "subordinate participation." The last term describes the approach adopted by this standard.

1. Full party status for the parent. "Full party status" means that the parent has the rights of an independent party under juvenile court procedure acts. Presumably, the parent could demand a trial when the juvenile and counsel for the juvenile had decided (as a result, perhaps, of bargaining with the prosecutor) to admit to the allegations of the petition. The parent could call witnesses whom neither the prosecution nor the defense desired to call, or the parent could ask questions of the prosecution witnesses that defense counsel, for strategic reasons, chose not to ask. These and other possible

conflicts in strategy between the parent and the juvenile could pose substantial risks to the freedom of counsel for the juvenile to conduct the defense according to counsel's, the youth's, or the guardian *ad litem's* view of the juvenile's best interest.

On the other hand, "competition" between the parent and the petitioner could occur if a hostile parent were a party and called witnesses, made motions, and took other steps intended to establish the allegations of delinquency. This might be attempted, for example, by a parent who was the complainant in the case.

Finally, tripartite proceedings would constitute a burden on the juvenile justice system, even if they were not very frequent. Such proceedings would be time-consuming, cumbersome, and costly.

2. Custodial defense rights. If the justification for parental rights in delinquency proceedings is the parent's stake in keeping custody of the juvenile, arguably those rights should be limited to those cases in which the juvenile's posture puts parental custody in jeopardy. Restricting the parent's role in this way would ensure that the parent would not serve as a second prosecutor, nor as a mere echo of the defense counsel. The parent would only participate to "fill a vacuum" in the defense, if the juvenile, in effect, sided with the petitioner.

Although this approach is superficially attractive, it would be difficult to administer. Should the parent be entitled to participate only if the juvenile enters a plea admitting the allegations of the petition, or at any time the parent feels the defense is not sufficiently vigorous? If the former, the parent might become "vested" of party rights too late in the proceedings to protect his or her own interests, for the respondent's formal posture might not be known until a number of pretrial procedural defense opportunities have passed—*e.g.*, participation at transfer, probable cause, and detention hearings. If the latter, the court will spend valuable time arbitrating disputes about the parent's right to intervene on the ground of an "inadequate defense" by counsel for the juvenile. If the court liberally granted leave to intervene, as it would probably tend to do, there would be no effective limit on the parent's role, and we would approach the unsatisfactory solution of full party status for parents.

3. The standard: "subordinate participation." Standard 6.5 A. 1. sets out the basic rights of a respondent's parent in delinquency proceedings. The rights are founded on the desire to give as much protection to the parent's interests as is feasible without substantially burdening the respondent's right to a fair and workable procedure. The parent's preadjudication hearing rights—to notice and presence, and to make representations to the court—fall short of party rights.

At the disposition stage, the parent is permitted to participate more fully. This distinction is based on the view that opportunities for confusion and cross-strategies are substantially reduced once the adjudication has been made. At disposition, when attention is focused on the goal of the best dispositional option for the juvenile, there is little harm in having another viewpoint fully presented to the court. Indeed, the parent's perspective is particularly valuable at that stage because parents usually play an important part in the subsequent course of events.

Subsection A. 2. implements subsection A. 1. by giving parents access to "all records in the case." Such access is important to enable parents to be helpful to the respondent, as well as to protect their own interests. The respondent's privilege to bar parental access, if the respondent is mature (Standard 6.1 B.) serves to protect the juvenile's privacy. In some cases, this privacy interest will be outweighed by competing values—e.g., when a predisposition report to which the juvenile has barred parental access contains negative information regarding the parent's capacity to supervise the juvenile at home. The court should use its discretion to resolve such conflicts of interest, subject to the necessity of protecting the juvenile's privileged communications arising from the lawyer-client, doctor-patient, or similar relationship.

Standard 6.5 B. is intended to permit the court to exclude or restrict the participation of a parent whose interest in the delinquency proceedings is adverse to the respondent's. Because exercise of this power may infringe upon the parent's constitutional rights, it should be used only in extreme cases when necessary to protect the juvenile. Examples of such cases might be when the parent is the complainant in the proceeding and is disruptive or threatens to violate the confidentiality of the proceedings, or where the presence of a parent who has incited or coerced the juvenile to perform the allegedly delinquent acts has an intimidating effect upon the juvenile.

The parent's right to "make representations to the court" should not be construed to permit the parent in jury trials to make statements in the jury's presence. The danger that such statements might prejudice the jury against the respondent outweighs the value of permitting them.

Standard 6.5 C. sets forth the obligation to compensate for the parent's linguistic handicaps by providing interpreter services for the parent at all stages of the proceedings. See Standard 2.3. In many cases involving a bilingual parent, the interpreter's services will also be needed to assist the juvenile and/or witnesses.

*Constitutional objections.* The limited role accorded parents under these standards must be assessed in the light of constitutional requirements. The parent's interest in the custody and care of the juvenile is an interest protected under the due process clause of the fourteenth amendment. See *Prince v. Mass.*, 321 U.S. 158 (1944); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Stanley v. Illinois*, 405 U.S. 645 (1972). Under *Gault* and succeeding cases, the juvenile's liberty is also a recognized interest protected by the fourteenth amendment. But the fact that both the juvenile and the parent have protectable interests under the fourteenth amendment does not necessarily mean that both are entitled to the same measure of due process. "The extent to which procedural due process must be afforded [an individual] is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly*, 397 U.S. 254, 262, 263 (1970). The Constitution requires us to balance the parent's need for particular procedural protections for the custody interest in the juvenile, such as the right to a hearing, counsel, and confrontation, against the burdens that such rights would impose on other legitimate interests.

The other legitimate interests that must be considered are those of the juvenile, which have been discussed above, and those of the state, particularly its interest in conducting expeditious, orderly, and economical proceedings. The policy decision must be influenced by the fact that, ordinarily, the parent's interest will coincide with either that of the juvenile or of the petitioner. Preadjudication and adjudication delinquency proceedings are basically adversary, focused on fact finding. There are rarely three distinct "sides" in such proceedings.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), an unwed father challenged a state law which automatically made the children of unwed fathers wards of the state upon the death of the mother. All other parents, including unwed mothers, were entitled to a hearing on their fitness as parents before their children were removed from their custody. The Supreme Court concluded that as a matter of due process, unwed fathers, like other parents, were entitled to a hearing on their fitness as parents in dependency proceedings. The Court also held that in denying a hearing to Stanley and others like him, while granting a hearing to all other parents, Illinois denied the former equal protection of the law under the fourteenth amendment. 405 U.S. at 658.

The crucial question regarding the constitutionality of the standard is whether the Court's assertion in *Stanley* that "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," 405 U.S. at 651, must be read broadly to require granting the parent a right to a full hearing in delinquency cases in which parental custody is jeopardized. The negative response implied by the standard is based on the view that delinquency cases are critically distinct from the proceedings to terminate parental rights that were involved in *Stanley*.

In delinquency proceedings, the primary focus is not, as in *Stanley*, on the parent's right to custody. The fact-finding hearing in delinquency cases concentrates on the juvenile's conduct, rather than on the parent's fitness to care for and raise the juvenile. Conversely, in neglect or dependency proceedings, the parent's constitutionally-protected custody interest is directly threatened. The primary impact of the two kinds of proceedings, therefore, in terms of liberty and stigma, differ greatly, in that they fall primarily on the juvenile in one case and on the parent in the other.

There is a further important distinction between delinquency proceedings and the proceeding in *Stanley*, which goes to the nature of the "grievous loss" inflicted by the proceedings. In *Stanley*, the parent lost 1. all custodial and guardianship rights, 2. forever. In a delinquency case, even assuming the juvenile receives a maximum period of incarceration, the parent loses 1. only physical custody, but not residual parental rights (such as rights to visit, to consent to major surgery, marriage, or enlistment in the military), 2. temporarily, not permanently.

If it is recognized that, by comparison with the *Stanley* case, the parent's custody interest is only marginally threatened in delinquency cases, the standard affords ample due process to protect that interest. "Due Process of law does not require a hearing 'in every conceivable case of government impairment of private interest'." *Id.* at 650.

By providing the parent with notice, the right to be present, and the right to make representations to the court, the standard does provide the parent with a meaningful opportunity to protect the custodial interest without unduly burdening the system's ability to focus upon the primary interest at stake in delinquency proceedings, that of the juvenile.

#### 6.6 "Parent" defined.

The term "parent" as used in this part includes:

A. the juvenile's natural or adoptive parents, unless their parental rights have been terminated;

B. if the juvenile is a ward of any person other than a parent, the guardian of the juvenile;

C. if the juvenile is in the custody of some person other than a parent, such custodian, unless the custodian's knowledge of or participation in the proceedings would be detrimental to the juvenile; and

D. separated and divorced parents, even if deprived by judicial decree of the respondent juvenile's custody.

#### *Commentary*

Many of the juveniles who appear as respondents in delinquency proceedings come from home backgrounds that do not match the middle class image of "normal" family ties. If the juvenile is not living with the biological parents, other persons may be functioning in a parental role, such as adoptive or foster parents, or other persons who have custody of the juvenile. Standard 6.6, defining the term "parent" for the purpose of deciding who should be informed of the delinquency proceedings and have an opportunity to participate in them, is broadly drafted to include such other persons.

The term "natural" parent is intended to include the putative father of an illegitimate child who lives with or supports the juvenile, whether or not his paternity has been legally established. Compare Colo. Children's Code § 22-1-3(5) (1963); Ill. Ann. Stat. ch. 37, § 701-14 (1972). Although the constitutional status of parental rights in such cases is unsettled, see *Stanley v. Illinois*, 405 U.S. 645 (1972), it seems preferable to include rather than exclude such a parent if his identity and whereabouts are known. The burden on the state and parties of giving notice is slight, and only parents interested in the juvenile's welfare are likely to respond by involving themselves in the proceedings.

The language in Standard 6.6 C. regarding custodians whose knowledge or participation would be detrimental to the juvenile is meant to apply to the case in which, for example, the respondent is in a private residential school and it seems inappropriate to notify the school director of the proceedings. However, the term "parent" is not intended to apply to a corrections agency having custody of a juvenile.

#### **6.7 Appointment of guardian *ad litem*.**

**A. The court should appoint a guardian *ad litem* for a juvenile on the request of any party, a parent, or upon the court's own motion:**

- 1. if the juvenile is immature as defined in Standard 6.1 B. 2.;**
- 2. if no parent, guardian, or custodian appears with the juvenile;**

3. if a conflict of interest appears to exist between the juvenile and the parents; or

4. if the juvenile's interest otherwise requires it.

B. The appointment should be made at the earliest feasible time after it appears that representation by a guardian *ad litem* is necessary. At the time of appointment, the court should ensure that the guardian *ad litem* is advised of the responsibilities and powers contained in these standards.

C. The function of a guardian *ad litem* is to act toward the juvenile in the proceedings as would a concerned parent. If the juvenile is immature, the guardian *ad litem* should also instruct the juvenile's counsel in the conduct of the case, and may waive rights on behalf of the juvenile as provided in Standard 6.3. A guardian *ad litem* should have all the procedural rights accorded to parents under these standards.

D. The following persons should not be appointed as a guardian *ad litem*:

1. the juvenile's parent, if the parent's interest and the juvenile's interest in the proceedings appear to conflict;

2. the agent, counsel, or employee of a party to the proceedings, or of a public or private institution having custody or guardianship of the juvenile; and

3. an employee of the court or of the intake agency.

E. Courts should experiment with the use of qualified and trained nonattorney guardians *ad litem*, recruited from concerned individuals and organizations in the community on a paid or volunteer basis.

#### *Commentary*

*Background.* The use of guardians *ad litem* in civil proceedings is discussed in the commentary to Standard 6.1. About one-third of the jurisdictions in the United States currently have statutory provisions governing the appointment of guardians *ad litem* in juvenile delinquency proceedings. The statutes provide for either mandatory or discretionary appointment. The Uniform Juvenile Court Act is typical of the mandatory appointment provisions. It requires the court to appoint a guardian *ad litem* at any stage of the proceedings if the juvenile has no parent, guardian, or custodian appearing in his or her behalf, or if there is a conflict of interest between those appearing in the juvenile's behalf, and the juvenile. Uniform Act § 51 (1959). See also Minn. Stat. Ann § 260.155(4) (1971); N. D. Century Code § 27-20-48 (Supp. 1973); Tenn. Code Ann. § 37-248 (Supp. 1972); Vt. Stat. Ann. tit. 33 § 653 (Supp. 1974). It has been

held that failure to appoint a guardian *ad litem* in delinquency proceedings where such appointment is required by statute constitutes reversible error. See, e.g., *In re Faubus*, 498 S.W.2d 21 (Tex. Civ. App. 1973); *Premeaux v. State*, 472 S.W.2d 795 (Tex. Civ. App. 1971); *Boardman v. State*, 473 S.W.2d 538 (Tex. Civ. App. 1971); *Felder v. State*, 463 S.W.2d 272 (Tex. Civ. App. 1971).

The Children's Bureau Legislative Guide is typical of the discretionary appointment statutes. It states that "the court, at any stage of a proceedings . . . may appoint a guardian *ad litem* for a child who is a party to the proceedings, if he has no parent or guardian or custodian appearing in his behalf or their interests conflict with those of the child." Legislative Guide § 41 (1969). See also N. M. Stat. Ann. § 13-14-25 (Supp. 1973); Utah Code Ann. § 55-10-89 (Supp. 1973); Wyo. Stat. Ann. § 14-115.17 (Supp. 1973). In other jurisdictions the factors that give rise to the appointment of a guardian *ad litem* to represent the interests of a juvenile in delinquency proceedings include the minority or incompetency of the juvenile's parents, Minn. Stat. Ann. § 260.155 (4) (1971); application for appointment by a party, Ill. Ann. Stat. ch. 37, § 704-5 (1972); Tenn. Code Ann. § 37-248 (Supp. 1972); Vt. Stat. Ann. tit. 33, § 653 (Supp. 1974); the court's judgment that such appointment is necessary, Fla. Rules of Court, Juv. Proc., Rule 8.170 (Temporary Rules, 1973); S.C. Code Ann. § 15-1193 (Supp. 1974); or desirable, Minn. Stat. Ann. § 260.115(4) (1971); Wis. Stat. Ann. § 48.23 (3) (1957); and in a particular case for the juvenile's welfare, Alaska Stat. Ann. § 47.10.050 (1971); Iowa Code Ann. § 232.11 (1969).

*Functions.* Standard 6.7 C. assigns two distinct roles to the guardian *ad litem*: 1. to instruct counsel and exercise or waive rights on behalf of immature juveniles; and 2. to exercise parental functions of advice and support in the proceedings if the parent is not available to do so. The need for appointment for both purposes has been discussed earlier. See commentary to Standards 6.1 and 6.5. Subsection A. 1. recommends court appointment for the first purpose, and subsections A. 2.-4. for the second. Subsection A. 4., requiring appointment "if the juvenile's interest otherwise requires it," contemplates cases where the parent is present and there is no conflict of interest, but the parent seems incompetent, disinterested, or otherwise incapable of being a source of positive guidance and support to the juvenile.

The statements in Standard 6.7 A. that a guardian should be appointed "on the request of any party, a parent, or upon the court's own motion," and in Standard 6.7 B. regarding the need for early

appointment, should be read in light of other relevant standards. If the respondent appears too immature to act on his or her own behalf in the proceedings, counsel has the obligation to ask the court to appoint a guardian *ad litem* (Standard 6.1 C.). If counsel treats the client as mature, the parent may challenge that judgment by asking the court at any time to appoint a guardian for the juvenile. Or, the need for a guardian to act on behalf of the juvenile may appear to the court in administering a waiver (Standard 6.4). Intake staff are responsible, under Standard 5.3 B., to ascertain and report to the court any parent-juvenile conflict of interest in the proceedings that might lead the court to appoint a guardian *ad litem* to act in place of the parents. And in all cases, the court has an obligation to be alert to the need for a guardian *ad litem* to perform either of the guardian's two major functions.

A guardian *ad litem* appointed under Standard 6.7 A. 2.-4. stands in the place of the respondent's parent. As such, the guardian *ad litem* has all the procedural rights accorded to parents under the standards. See Standard 6.7 C. A guardian appointed under Standard 6.7 A. 1. has the same rights and, in addition, instructs counsel on behalf of the juvenile. See Standard 6.7 C.

*Who should be appointed.* Although little has been written about the institution of guardians *ad litem*, it seems that in practice the general experience has not been successful. If that is true, it may in part result from the lack of appropriate guidelines defining the role of the guardian *ad litem* and the scope of the guardian's authority. *Quesnell v. State*, 83 Wash. 2d 224, 517 P.2d 568, 575 (1973). It may also stem from uncertainty about who should be eligible to be appointed as guardians *ad litem*, in order to serve respondents most effectively, and what qualifications or training are suitable, or unsuitable, for performance of that role. According to common complaints, the position of guardian *ad litem* is often given by judges as a sinecure to attorney friends. Individuals appointed as guardians frequently have no experience or training to act in that role, and may do little or nothing on behalf of their wards. But dissatisfactions with the institution are notably more forthcoming than specific suggestions for improvement.

Standards 6.7 D. and E. contain several guidelines to assist the court in deciding whom to appoint as a guardian *ad litem*. If the appointment is under subsections A. 2.-4. of Standard 6.7, the parent, obviously, will not be eligible, for the purpose of the appointment is made under Standard 6.7 A. 1., for an immature respondent. will therefore operate to exclude parents, primarily when appoint-

ment is made under Standard 6.7 A. 1., for an immature respondent. Normally, in such cases, the court will first consider the parent for appointment. But, as stated by the Alaska Supreme Court in *R.L.R. v. State*, 487 P.2d 27 (Alaska, 1971):

If a parent is considered for appointment, careful judicial scrutiny is needed to assure no conflict of interest between the parent's duty to advance his child's interests and his own desire to use the court in order to discipline the child, and to assure adequate knowledge of the consequences of his decisions. *Id.* at 35, citing Note, "Waiver in the Juvenile Court," 68 *Colum. L. Rev.* 1149, 1159 (1968).

See also commentary to Standard 6.1.

Whether the guardian is appointed to instruct counsel for an immature juvenile, or to perform the functions of a parent, the effect of subsection D. 2. is to declare the juvenile's counsel ineligible. Although it may be less expensive and cumbersome to have one person represent the juvenile in the dual roles of counsel and guardian *ad litem*, cogent arguments have been presented against dual appointment. See commentary to Standard 6.1.

A federal court recently held that there must be separate roles for counsel and guardian *ad litem* in Wisconsin civil commitment proceedings. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972). The court concluded that the appointment as counsel of the incompetent's guardian *ad litem*, who was a member of the Bar and otherwise competent to practice, could not satisfy the constitutional requirement of representative counsel because of the different nature of the two roles. *Id.* at 1097. And the Alaska Supreme Court said in *R.L.R. v. State*, 487 P.2d 27 (Alaska, 1971), "If the child's attorney is appointed, he may be unsure where his advocate's role ends and his role of judging his ward's best interests begins." *Id.* at 35. Even if the juvenile is mature, and appointment of a guardian is required to replace an adverse or unavailable parent, counsel should not be eligible. One of the important functions of the parent in delinquency proceedings is to keep a watchful eye on counsel and to serve as an independent source of friendly adult advice. See commentary to Standard 6.5. Defense counsel can neither monitor nor evaluate his or her own performance objectively.

Also ineligible under subsections D. 2. and D. 3. are other individuals whose interest in the delinquency proceedings seem particularly prone to conflict with the respondent's interest: intake officers, prosecution officials, and agents or employees of a public or private institution having custody or guardianship of the juvenile.

The latter provision is meant to exclude appointment as guardian *ad litem* of such institutional custodians and guardians as the state department of child services, or a private child welfare agency, but not a foster parent who is not otherwise ineligible under subsection D. 1.

The need seems clear to develop new sources in the community to serve as guardians *ad litem* for juveniles who lack parents or other relatives suitable for the task. To the extent that courts now confine guardianship appointments to attorneys, they replicate rather than supplement the skills and aptitude already available to the juvenile in the person of defense counsel. A guardian *ad litem* should have some understanding of the delinquency proceedings, and an ability to communicate with the juvenile's counsel and with the court, but need not be an attorney.

Guardians *ad litem* should be selected and trained for other qualities: the ability to achieve rapport with the youth, family, and friends; familiarity with relevant community services; and a commitment to invest time, energy, and concern in young people. Standard 6.7 E. suggests that courts experiment with developing new sources of nonattorney guardians *ad litem* from concerned individuals in the community. These might include students of law, social work, and divinity; clergy; child advocacy groups; and citizen volunteers. Strong efforts should be made to appoint persons who share the respondent's racial, ethnic, and linguistic background. Experiments are needed with both paid and volunteer services. In courts that appoint sufficient numbers of guardians *ad litem* to justify it, training programs should be developed; for other courts, training materials might be developed on a state or regional basis. Such measures will ease the court's burden under Standard 6.7 B. to ensure that the person appointed understands his or her responsibilities and powers in the proceedings.

#### 6.8 The parent's right to counsel.

A. A parent should receive notice of the right to counsel when he or she receives the petition or the summons and also, if the parent appears without counsel, at the start of all judicial hearings. The notice should state that the juvenile's counsel represents the juvenile rather than the parent, that if the parent wishes, he or she has a right to be advised and represented by his or her own counsel, to the extent permitted by Standard 6.5, and that a parent who is unable to pay for legal assistance may have it provided without cost, to the extent permitted by Standard 6.5.

B. A parent's counsel may be present at all delinquency proceedings but should have no greater right to participate than a parent does under Standard 6.5.

*Commentary*

The Supreme Court in *In re Gault*, 387 U.S. 1 (1967), referred in some passages to the "child's right to be represented by counsel" and in others to "the right to counsel which [Mrs. Gault] and her juvenile son had." *Id.* at 41, 42. The notion of a "shared" constitutional right causes no difficulties in most delinquency cases, where a single retained or appointed attorney represents the respondent in consultation with the respondent's parent. See commentary to Standard 6.5. But if there is a conflict of interest between the juvenile and parent, a single attorney cannot represent both. See Standard 5.3 C.

Juvenile court statutes frequently provide for a joint juvenile-parent right to counsel in delinquency cases, but require or permit the court to appoint separate counsel for the parent if a conflict of interest is found. Cal. Welf. & Inst'ns Code § 634 (1971); D.C. SCR-JUV. Rule 44 (1970); Ill. Ann. Stat. ch. 37 § 701-20(1) (Smith-Hurd 1972); Minn. Rules for Juv. Proc., Rule 2-1(3)(b), (4) (1970); NCCD, Model Rules, Rule 39 (1969).

This standard would modify the existing law by freeing the parent's right to counsel from dependence upon a prior judicial finding of a conflict of interest between the juvenile and the parent. In the great majority of cases, parents can be expected to waive the right to separate counsel. Generally, they will confine their participation to consulting with and assisting the juvenile and counsel in the defense. See commentary to Standard 6.5. In some cases, however, because of conflict with the juvenile and/or the juvenile's attorney, a parent will wish independent representation of his or her interests in the proceedings.

Within the limits of the parent's permissible role under Standard 6.5, the parent should be allowed to appear by separate counsel without having to convince a judge that parental interests do conflict with those of the juvenile. This view seems most consistent with the standards' recognition of the parent's substantial independent interest in the outcome of the proceedings.

To make the parent's right to counsel meaningfully and equally available, Standard 6.8 A. requires that notice of the right be given.

**6.9 Appointment of counsel for parent unable to pay.**

**A. The court may appoint counsel for a respondent's parent who does not waive that right and who is unable to obtain adequate representation without substantial hardship to the parent or family.**

**B. A preliminary determination of the parent's eligibility for court-appointed counsel should be made at the earliest feasible time after the parent's right to appointed counsel arises. The final deter-**



mination should be made by the judge or an officer of the court selected by the judge. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

C. The ability to pay part of the cost of adequate representation should not preclude eligibility. The court may appoint counsel on the condition that the recipient make some reasonable payment in accordance with financial capabilities.

#### *Commentary*

Because most families of delinquency respondents are in modest or low income brackets, the parent's right to separate counsel, at the court's discretion, would have little practical meaning if it did not include the right to court-appointed counsel for a parent financially unable to retain private counsel. Yet, it would be defensible for the standards to recognize only a right to retained counsel, given the relative marginality of the parent's stake in the proceedings and the need to channel available funding and personnel resources into the provision of services for juveniles. However, the standards provide that the parent's right to counsel at the adjudication hearing is subject to the court's discretion. At other hearings, including the dispositional proceeding, the parent's right is mandatory although waivable. The juvenile's right to counsel is nonwaivable.

But, while conceding that the first priority is to provide representation for the juvenile, it seems fundamentally unfair to permit affluent parents to defend their interests by means unavailable to indigent parents in a state-initiated proceeding which threatens custodial rights. Sensitive to the principles of equal protection of the law, and anticipating that parents will rarely exercise the right to separate counsel, the standard recommends that court-appointed counsel be made available to those financially eligible therefor.

Existing juvenile court legislation and case law affords little guidance as to standards of financial eligibility or methods of appointment. Standard 6.9 A., B., and C. is adapted from Standards 6.1, 6.2, and 6.3 of the ABA Standards, *Providing Defense Services* (Approved Draft, 1968). The standard adopts the flexible standard of "substantial hardship" (Standard 6.9 A.), and permits the court to subsidize a parent who is able to pay part, but not all, of counsel costs (Standard 6.9 C.).

#### 6.10 Waiver of the parent's rights.

A. Any right accorded to a parent by these standards or under federal, state, or local law may be waived. A parent may effectively waive a right only if the parent is fully informed of the right and voluntarily and intelligently waives it. The failure of a parent who has the right to counsel to request counsel should not of itself be construed to constitute a waiver of that right.

B. A parent's waiver of counsel should not be accepted unless it is in writing and recorded. If the waiving party's dominant language is not English, the safeguards described in Standard 6.4 B. of this part should apply.

#### *Commentary*

Unlike the respondent's right to counsel, the parent's right may be waived, as may other rights accorded the parents by these standards. See Standard 6.5. Standard 6.10 A. adapts Standard 6.2 of the ABA Standards, *Providing Defense Services*; Standard 6.10 B. is based on Standard 7.3 of the same volume. See commentary to Standard 6.4.

### PART VII: JUVENILE COURT CALENDARING

#### 7.1 Priorities in scheduling juvenile court cases.

A. To effectuate the right of juveniles to a speedy resolution of disputes involving them, and the public interest in prompt disposition of such disputes, juvenile court cases should always be processed without unnecessary delay.

B. Insofar as is practicable, hearing priorities should favor the following categories:

1. young, immature, and emotionally troubled juveniles;
2. juveniles who are detained or otherwise removed from their usual home environment; and
3. juveniles whose pretrial liberty appears to present unusual risks to themselves or the community.

#### *Commentary*

Because juveniles have a "built-in time sense based on the urgency of their instinctual and emotional needs," Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* 40 (1973), special attention must be given to speedy decisionmaking in the juvenile court. Juveniles are less well able than adults to anticipate the future and cope with delays. Thus, undue delays in the processing of juvenile

court cases give rise to feelings of impatience and frustration which can be psychologically harmful to the young persons. *Id.* at 41-42.

Stigmatization of the juvenile can also result from long delay before the adjudication. A juvenile, whether innocent or not, who has charges outstanding can be expected to suffer anxiety concerning negative reactions in the community, in school, and perhaps at home. Prompt and speedy processing of cases can alleviate this strain.

In criminal cases, the sixth amendment and most state constitutions guarantee the right to a speedy trial. Note, "The Right to a Speedy Criminal Trial," 57 *Colum. L. Rev.* 846 (1957). Statutes in most states set forth the time within which a defendant must be tried following the date he or she was arrested, held to answer, committed, or indicted. ABA, *Standards Relating to Speedy Trial* § 2 (Approved Draft, 1968). Although the sixth amendment's speedy trial guarantee expressly applies to criminal cases, it may also apply to delinquency proceedings. The Supreme Court has already concluded that delinquency proceedings must be regarded as "criminal" for purposes of according juveniles the fifth amendment's privilege against self-incrimination. *In re Gault*, 387 U.S. 1, 49-50 (1967).

State courts that have considered whether the right to a speedy trial is enforceable in juvenile courts have ruled affirmatively. See, e.g., *Piland v. Clark County Juvenile Court*, 85 Nev. 489, 457 P.2d 523 (1969); *State v. Henry*, 78 N.M. 573, 434 P.2d 692 (1967). The Children's Bureau Legislative Guide proposes fixing time limitations for hearings in order to speed up court processes and prevent long delays. Legislative Guide § 17 (1969).

Standard 7.1 A. assumes that juvenile delinquency respondents have the same right to a speedy trial as criminal defendants, but that they deserve special further consideration because of their youth. The hearing priorities of subsection B. 1. are intended to avoid undue delay in proceedings involving those juveniles who are most likely to be vulnerable to psychological harm.

The hearing priorities of subsection B. 2. are based on another concern. Considering the juvenile's special sense of time, efforts must be made to keep at a minimum the time that the juvenile must spend away from home. A long separation from parents or parent figures can lead the juvenile to feelings of permanent loss, helplessness, and deprivation. Goldstein et al., *supra* at 42. Subsection B. 2. is derived from Rule 50 of the District of Columbia Rules Governing Juvenile Proceedings (1974), which gives preference in calendaring to cases of juveniles who are detained or in shelter care.

Although the principles underlying Standard 7.1 primarily concern

protection of the juvenile, subsections 7.1 A. and B. 3. also recognize the public interest in prompt disposition of juvenile cases. From the public point of view, speedy resolution of disputes is necessary to preserve the evidentiary means of proving the charge, to maximize any deterrent effect of the proceedings, and to avoid, in some cases, an extended period of pretrial liberty for respondents whose pretrial liberty may pose dangers to themselves or the community.

#### 7.2 Court control; duty to report.

Control over the juvenile court calendar should be vested in the court. The official charged with representing petitioners should be required to file periodic reports with the court setting forth the reasons for delay as to each case for which no trial has been requested within a prescribed time following the filing of the petition. Such official should also advise the court of facts relevant in determining the order of cases on the calendar.

#### *Commentary*

This standard states the general principle that the court should control calendaring in juvenile court, and contains means of providing the court with information needed to perform the calendaring function. Although it is sometimes argued that control of the criminal court calendar should be vested in the prosecutor, Note, "Calendar Practice in Criminal Courts—Control by Court or Prosecutor?" 48 *Colum. L. Rev.* 613 (1948), in most jurisdictions that responsibility is given by statute to the court or the court clerk. ABA, *Standards Relating to Speedy Trial* § 1.2 (Approved Draft, 1968). This standard is based on the principle that there is inherent power in the court to control its own calendar. If the petitioner controlled the calendar, the petitioner could have an unfair advantage over the respondent.

This standard requires the prosecutor to file periodic reports with the court on all cases for which trial has not been requested within a prescribed time after the filing of a petition. In this way public accountability is imposed on the petitioner and the public interest can be protected in those cases requiring prompt disposition because the respondent poses a danger to the community. The standard follows the ABA standards. ABA, *Standards Relating to Speedy Trial* § 1.2 (Approved Draft, 1968).

### 7.3 Calendaring aims and methods.

A. The court should endeavor by control of the calendar to ensure a regular and efficient flow of cases through the court.

B. Every reasonable effort should be made to ensure that the same judge who presides at the adjudication hearing presides at all post-adjudication proceedings.

C. Calendaring should be designed, insofar as is practicable, to avoid having a judge preside at the adjudication hearing who has had earlier prejudicial contacts with the case.

#### *Commentary*

Standard 7.3 deals with the aims of judicial calendar control and the methods of scheduling and assigning delinquency cases that are most useful for achieving those aims.

*Calendaring goals.* Standard 7.3 A. addresses the juvenile court judge's special duty to expedite all hearings. Thompson, *California Juvenile Deskbook* § 5.11. Calendar control is crucial in the juvenile court in order to manage increasing caseloads, *id.* at § 5.1, and each court should analyze its volume and try to use the most efficient and expedient calendaring method possible. Smaller, rural courts have different calendaring needs than metropolitan courts. In metropolitan areas, caseloads tend to be larger and are increasing. The court's calendaring method should enhance the efficient use of court personnel and facilities, and avoid the inconvenience and expense to all concerned resulting from delay.

*Calendaring methods.* There are two principal methods of calendaring cases: calendaring by "random assignment" and "individual calendaring." In random assignment, the case is assigned to any available judge each time it is to be heard in court for any purpose. In individual calendaring, one judge retains the case from initiation to completion. The best method of calendaring for the juvenile court is, as for other courts, debatable. In a sense, random assignment permits the most efficient use of personnel and results in the most rapid disposition of cases, because hearings can be scheduled without regard to the availability of any particular judge. But under the random assignment method, a new judge usually must become acquainted with the facts and background of the case at each hearing. Under the individual calendaring system, since the same judge handles the case

from beginning to end, the judge can become familiar with the background of the particular juvenile and attempt an individual approach. Although an individual calendaring system may require certain safeguards against "contamination" of the trial judge resulting from exposure to prejudicial information at pretrial stages of the process, this method does seem most consistent with the juvenile court's goal of individualized justice. It would seem particularly important that the juvenile's case not be handled at the crucial stage of disposition by a judge who is entirely new to the case.

Standard 7.3 B. recommends a calendaring method prescribed by the District of Columbia Rules of Juvenile Proceedings, Rule 50 (1974) which, it is hoped, combines the best of the random assignment and individual calendaring systems. The standard permits the random assignment of preadjudication and adjudication hearings, and thereby retains the relative efficiency of that calendaring method. But it recommends that the same judge who presides over the adjudication hearing should preside at all postadjudication hearings through disposition. That judge will be more aware of the facts of the case and have a better understanding of the juvenile than a judge who by random assignment first comes into the case after the adjudication hearing. The trial judge's knowledge of the case should help the judge to decide disposition issues wisely. Because in many cases there is no continuance between the adjudication and disposition hearings, it will not usually delay the proceedings to require that the same judge preside over both. Delay, when it does occur, will usually be offset by the advantages of judicial continuity.

A juvenile has the right to an impartial fact-finder. Therefore, Standard 7.3 B. recommends that calendaring should be designed, if practicable, to avoid having the same judge preside over the adjudication hearing who has handled earlier proceedings in the case, such as detention and transfer hearings, if they have exposed the judge to prejudicial information about the respondent. Such information might be contained in a social or medical report, prior record, or family history. At transfer, detention, and other preliminary hearings, hearsay and other evidence might be introduced that would not be admitted at the adjudication hearing because such evidence would prejudice the juvenile's right to a fair hearing. Standard 7.3 B. is designed to protect this right.

*"Formal" and "informal" calendars.* In New Jersey there is a "split calendar" system in the juvenile court. One calendar consists of all cases predetermined possibly to result in institutional commit-

ment. In these cases the juvenile is afforded the full panoply of *Gault* rights. The other calendar, containing all other cases, is an "informal" one. In cases on the "informal" calendar the juvenile is not extended the full *Gault* protections and representation by counsel is not required. Chused, "The Juvenile Court Process: A Study of Three New Jersey Counties," 26 *Rutgers L. Rev.* 488 (1973). Disposition in informal cases may not result in institutional placement. The rationale of the New Jersey system is that the formal procedures mandated by *Gault* interfere with the informal, rehabilitative design and goals of the juvenile system, and such procedures should not be imposed except where the holding of *Gault*, narrowly construed, so requires. Baumgart, "Sift Out Dangerous Delinquents," 4 *Trial* 13 (1968).

This standard does not recommend adoption of the split calendar system. The New Jersey system has been criticized for giving very broad discretion to the person—police officer, probation officer, judge, or clerk—who determines on which calendar to place a given case. *Id.* at 14. The calendaring decision not only affects the ultimate disposition of the case, but also can affect adjudication, preadjudication, detention, and frequency of institutional remands. Chused, *supra* at 488.

Several other aspects of the split calendar system have drawn criticism. One is that a case placed on the informal calendar can be moved at any time to the formal calendar, Rules Governing the New Jersey Courts, Rule 5.9-1(e) (1972) (hereinafter cited as N.J. Rules), although certain proceedings may have already been conducted without the presence of counsel or other due process protections. Another possible abuse stems from the court's authority to remand juveniles who have been adjudicated delinquent on the informal calendar to detention centers or diagnostic institutions. N.J. Rules, Rule 5.9-8. One scholar has noted that these remands involve "significant periods of total confinement," Chused, *supra* at 499 (1973), and may involve juveniles who otherwise could not constitutionally be "committed" to a state institution because their cases were processed on the informal calendar.

Studies have also shown that in New Jersey the respondent's prior record of delinquency adjudications, although the result of "informal" proceedings, may indirectly result in institutionalization. Baumgart, *supra* at 14; Chused, *supra* at 515-16. A recent case, *State v. G.J.*, 108 N.J. Super. 186, 260 A.2d 513 (1969), illustrates the problem. There, a juvenile originally found delinquent on the informal calendar for excessive absence from school and sentenced to probation found herself, eleven months later, committed to a state institu-

tion upon proof of charges of probation violation. On appeal, the juvenile argued that her commitment was unconstitutional because ultimately based upon violation of a probation sentence imposed on the informal calendar, without benefit of due process. The appeals court upheld the commitment, relying on the fact that the probation violation hearing itself had been heard on the formal calendar, with benefit of counsel for the juvenile. The court suggested that in the future such cases should be handled by filing a new delinquency petition based upon violation of probation and hearing the petition on the formal calendar. *Id.* at 514. The *G.J.* case indicates that the consequences of an "informal" calendar hearing, with relaxed procedural safeguards, can be serious indeed. It therefore casts doubt upon the underlying premises, and indeed the constitutionality, of the split calendar system.

#### 7.4 Calendaring of pretrial motions; pretrial conference.

A. Motions in civil or criminal proceedings that are ordinarily in writing should also be made in writing in delinquency proceedings.

B. In appropriate cases the court should hold an omnibus hearing prior to adjudication, in order to:

1. ascertain whether the parties have completed the discovery authorized in Part III and, if not, make appropriate orders to expedite completion;
2. make rulings on any motions or other requests then pending, and ascertain whether any additional motions or requests will be made at the hearing;
3. ascertain whether there are any procedural or constitutional issues that should be considered before trial; and
4. ensure compliance with the standards regarding provision of counsel.

C. Whenever proceedings at trial are likely to be protracted or unusually complicated, or upon request by agreement of counsel, the court should hold one or more pretrial conferences, with counsel present, to consider such matters as will promote fair and expeditious proceedings.

#### *Commentary*

*The standard.* Standard 7.4 A. requires that motions be made in writing if they are of the kind that are ordinarily in writing in civil and criminal proceedings. Subsections 7.4 B. and C., respectively, recommend that juvenile courts should, in the judge's discretion, hold



omnibus hearings and pretrial conferences, particularly in cases that appear to be protracted or complex.

*Written motions.* In many juvenile courts, motion practice is extremely informal. But the reasons in civil and criminal proceedings for requiring that motions generally be submitted in writing apply equally to juvenile court. Submitting a motion in written form gives notice to the other party and to the judge of the scope and reasons for the motion, permits advance preparation and response to the motion, and provides a record of the motion for purposes of enforcement and appellate or other subsequent proceedings. Thus, the submission of motions in writing promotes orderliness, speed, and efficiency in the calendaring of judicial proceedings. These are primary goals in juvenile delinquency cases.

In complex cases where many motions are contemplated, the court may wish to hold an omnibus hearing, discussed below. In those cases, normal written motion practice may be dispensed with. ABA Standards, *Discovery* 118 (1970).

*Omnibus hearings: background.* The omnibus hearing is a recent innovation in criminal procedure designed to increase fairness and decisional certainty while promoting speedy disposition of cases and efficient use of judicial time. Nimmer, *Omnibus Hearing, an Experiment in Relieving Inefficiency, Unfairness, and Judicial Delay* 3 (1971). Following preliminary experimentation in California, the omnibus hearing procedure was proposed in the ABA, *Standards Relating to Discovery and Procedure Before Trial*, and was adopted by some criminal courts in the late 1960s. Its distinguishing features include: 1. the attempt to consolidate in one hearing, if possible, the various judicial decisions required before trial; 2. the requirement of a routine court exploration of all procedural and constitutional issues; and 3. the requirement that customary claims and procedures be considered insofar as possible without the preparation and filing of unnecessary papers. ABA Standards, *Discovery* 117.

Those who have studied the omnibus hearing operating in the criminal court have both criticized and praised it. See Nimmer, *supra*; Comment, "Why the Omnibus Hearing Project?" 55 *Judicature* 377 (1972). The critics say that the hearing tends to be time-consuming if used mechanically in every case, and that it encourages counsel to adopt delaying tactics. Nimmer, *supra* at 54. Allegedly the omnibus hearing consumes valuable court time in many cases that end in pleas. Pleas are also intentionally delayed by counsel until after the omnibus hearing takes place. Nimmer, *supra* at 42-43.

Omnibus hearings have been praised, on the other hand, for helping to eliminate unnecessary written motion practice, saving counsel and court effort, exposing latent procedural and constitutional problems, providing discovery for an informed plea, and substantially reducing calendar congestion. Comment, 55 *Judicature*, *supra*.

Several jurisdictions have used the omnibus hearing in juvenile proceedings. In 1974, the Colorado Council of Juvenile Court Judges adopted standards requiring an omnibus hearing in all cases where the allegations of the petition are denied and the court is in a district with "a substantial calendar of contested cases." Colorado Council of Juvenile Court Judges, *Standards of Juvenile Justice* § 5.1(a) (1974). Those standards reflect the promising experience of the Denver juvenile court where, since 1971, omnibus hearings have been mandatory in all cases going to jury trial. The Denver court's experience has reportedly shown "that a judicious use of the pre-trial or omnibus hearing significantly reduced the number of contested cases actually tried and helped reduce the backlog of pending cases." Colorado Council of Juvenile Court Judges, *supra* at 23. The omnibus hearing has also been used for a short period of time in the Seattle Juvenile Court but no study has been reported to date of its effectiveness.

Standard 7.4 B. recommends the use by juvenile courts of omnibus hearings "in appropriate cases." The standard therefore leaves the decision to hold such a hearing to judicial discretion. The omnibus hearing should not become a mechanical or burdensome procedure. In cases where the issues are simple, few motions are contemplated, a plea appears likely, or little discovery is requested, it may be unwise to hold an omnibus hearing.

*Omnibus hearing: procedures and sanctions.* The omnibus hearing marks the point at which informal, exploratory discovery ends—see Part III, *Discovery*—and the court becomes actively involved in the pretrial procedures. ABA Standards, *Discovery* 113. Accordingly, Standard 7.4 B. requires that the judge conducting the omnibus hearing inquire into the status of discovery, consider and rule on all motions and requests, discuss procedural and constitutional issues, and ensure that the provisions governing the appointment of counsel have been satisfied. The court should also consider any other matter that would expedite pretrial proceedings, such as whether any amendments or modifications to the petition should be offered and ruled upon by the court. Colorado Council of Juvenile Court Judges, *supra* at 22.

At the conclusion of the hearing, some form of written or transcribed record should be made indicating the disclosures made, the

rulings and orders of the court, stipulations, and any other matters determined or pending. ABA Standards, *Discovery* Standard 5.3(f). To simplify the conduct of the omnibus hearing, the ABA standards suggest the use of a checklist form indicating the various motions and requests that are generally made. *Id.* at 118. The purpose of court supervision at this point in pretrial procedure is "to ensure that what has been done has been correctly done, and that what needs to be done will be done properly and without unnecessary delay." *Id.* at 115.

Concerning enforcement sanctions that apply to omnibus hearing procedures, the ABA standards provide that failure to raise any issue that is ripe for decision at that point should constitute waiver as to that issue. ABA Standards, *Discovery* 120, Standard 7.4 B., does not incorporate that sanction because studies of omnibus hearing practices implementing the ABA standards suggest that the sanction of "implied waiver" may be impractical. One study, criticizing the omnibus hearing process for "not performing its function in obtaining an early, firm listing of all possible issues in the case," Nimmer, *supra*, indicated that the waiver sanction was not enforced at all. *Id.* at 82.

Observations showed widespread indifference on the part of defense counsel to the issue-identification process, and failure to use the checklist procedure properly. *Id.* at 63-64, 67. The observations suggest that the waiver sanction was considered impractical by both court and counsel and was therefore ignored. Standard 7.4 does not recommend that any particular sanction be applied by the court. In many cases, the judge's efforts to bring counsel together in order to expedite pretrial procedures will be fruitful without the aid of any sanctions, formal or informal. Courts may also find that a simple reprimand will serve effectively. The development of other effective enforcement techniques, without which the omnibus hearing can be wasteful, may have to await further experience in the criminal and juvenile courts.

*Pretrial conference.* The pretrial conference is a well-established practice in civil proceedings and has also been successfully employed in criminal cases. Its basic purpose is to expedite trial preparation by simplifying issues, removing time-consuming technical objections, and agreeing upon procedures for an orderly trial. Unlike the omnibus hearing, it should only be used in cases definitely going to trial and should be conducted shortly prior thereto.

The pretrial conference has proven to be the most popular of all the procedures found in the federal rules. James, *Civil Procedure* §

6.16, 223 (1965); Fed. R. Civ. P., Rule 16 (1973). But although one of the great benefits allegedly derived from use of the conference in civil proceedings is the large number of settlements it produces, James, *supra* at 228, a 1964 study of pretrial conferences in personal injury litigation concluded to the contrary. Rosenberg, *The Pre-Trial Conference and Effective Justice* 46 (1964). The precise value of the conference in civil cases, therefore, remains in dispute.

Although there is less precedent for pretrial conferences in criminal proceedings than in civil proceedings, they have been successfully employed. See "Handbook of Recommended Procedures for the Trial of Protracted Cases," 25 F.R.D. 351, 402 (1960). In 1966, the Federal Rules of Criminal Procedure were amended to include a rule on pretrial conferences. Fed. R. Crim. P. 17.1 (1973). However, the use of pretrial conferences in federal criminal courts antedates the rule and there is a considerable body of literature on the federal experience with these conferences. See, e.g., "Recommended Procedures in Criminal Pre-Trials," 37 F.R.D. 95 (1965); Brewster, "Criminal Pre-Trials—Useful Techniques," 29 F.R.D. 442 (1962); West, "Criminal Pre-Trials—Useful Techniques," 29 F.R.D. 436 (1962); "Handbook of Recommended Procedures for the Trial of Protracted Cases," *supra*; Kaufman, "Pre-Trial in Criminal Cases," 23 F.R.D. 319 (1959); Fee, "Pre-Trials in Criminal Cases," 4 F.R.D. 338 (1946).

On the whole, federal judges, and others associated with the courts, have reacted favorably to the use of pretrial conferences, particularly in protracted and complex criminal cases. One experienced attorney concluded that the conferences achieved good results by shortening trials, crystalizing fact issues actually in dispute, requiring lawyers to prepare their cases better and eliminating technical objections at trial. Brewster, *supra*.

Only a few jurisdictions provide for pretrial conferences in delinquency cases for a pretrial conference modeled on Fed. R. Civil P., and to the D.C. Rules Governing Juvenile Proceedings, Rule 17.1, the functions of the pretrial conference in juvenile proceedings include promoting fair and expeditious processing of the case and consolidation or disposition of cases relating to members of the same family or household. The Texas Rules of Civil Procedure also provide in delinquency cases for a pretrial conference modeled on Fed. R. Civil P., Rule 16. Texas Rules of Civil Procedure, Rule 166 (1973).

Most delinquency cases proceeding to trial involve only a few clearly identified issues and relatively uncomplicated procedures. As in criminal cases, therefore, pretrial conferences will rarely be needed in the juvenile court. But Standard 7.4 C. is included herein to guide the court and counsel in three situations: 1. if the trial is likely to be

protracted; 2. if the trial is likely to be complicated; or 3. if both counsel request such a conference. The first two situations reflect the generally accepted limitations of pretrial conferences in criminal proceedings to cases in which a long trial is expected, there are multiple defendants, or a considerable amount of documentary evidence is involved. See ABA Standards, *Discovery* 124. The third recognizes counsel's interest in promoting procedures that will conserve time and resources.

Among the matters that might be considered at a pretrial conference are: making stipulations to undisputed facts; marking documents and other exhibits for identification; waiving foundation evidence requirements for these documents; severance of respondents or offenses; use of jurors, conduct of *voir dire* and number of peremptory challenges; seating arrangements; and, where there are multiple respondents, settling the procedure on objections, presentation of evidence, and cross-examination. ABA Standards, *Discovery* Standard 5.4(a)(i-xiii). It should be stressed that the pretrial conference will only be worthwhile in cases where the matters discussed above threaten to absorb a large amount of trial time. In less complicated cases if any preliminary conferences are necessary an omnibus hearing would suffice.

Subsections 7.4 B. and C. are modeled on the ABA Standards, *Discovery* Standards 5.3 A. and 5.4 A.